Supreme Court, U.S.
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In the Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

- AND -

UNITED STATES BEET SUGAR ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit, in conflict with longstanding precedents of this Court, correctly held: (a) that the Customs Service may classify imported goods based on their post-importation use rather than on their condition as imported; and (b) that the importer is not entitled to fashion its imported merchandise so as to achieve the most favorable tariff rate.

RULES 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Federal Circuit:

1. Heartland By-Products, Inc., plaintiff-appellee;
2. United States of America, defendant-appellant; and
3. United States Beet Sugar Association, defendant-appellant.

Petitioner Heartland By-Products, Inc. is a wholly-owned subsidiary of E.D.&F. Man Sugar, Inc., whose ultimate parent is E.D.&F. Man Holdings Ltd. Between E.D.&F. Man Sugar, Inc. and E.D.&F. Man Holdings Ltd. are the following intermediate parent corporations, in ascending order: E.D.&F. Man Holdings, Inc.; E.D.&F. Man Netherlands B.V.; and Agman Holdings Ltd. No publicly held companies are in the chain of ownership.

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PETITION FOR A WRIT OF CERTIORARI

Heartland By-Products, Inc. ("Heartland") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-21a, is reported at 264 F.3d 1126. The order of the court of appeals denying rehearing and rehearing *en banc*, App., *infra*, 22a-23a, is unreported. The opinion of the Court of International Trade ("CIT") granting judgment to Heartland on the agency record, *id.* at 24a-62a, is reported at 74 F. Supp. 2d 1324. The opinion of the CIT denying respondents' motions for reconsideration, App., *infra*, 63a-71a, is reported at 86 F. Supp. 2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2001. App., *infra*, 1a. A petition for rehearing and rehearing *en banc* was denied on December 4, 2001. *Id.* at 22a-23a. On February 25, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISION INVOLVED

Subheading 1702.90 of the Harmonized Tariff Schedule of the United States ("HTSUS") prescribes the rate of duty applicable, *inter alia*, to "sugar syrups not containing added flavoring or coloring matter" that are "[d]erived from sugar cane or sugar beets." Such sugar syrups are classified under HTSUS 1702.90.10 or 1702.90.20 when they "[c]ontain[ ] soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids." When such sugar syrups contain more than 6 percent soluble non-sugar solids, they are classified under HTSUS 1702.90.40. Syrups classified

under HTSUS 1702.90.10 and 1702.90.20 are subject to a tariff-rate quota, while those classified under HTSUS 1702.90.40 are not. App., *infra*, 3a. HTSUS 1702 is reproduced in relevant part at App., *infra*, 72a.

STATEMENT

For more than a century, the Customs Service has classified imported merchandise in accordance with two fundamental principles established by this Court's precedents. The first bedrock principle of classification law is that, in the absence of a reference in the tariff schedule to the goods' use, goods must be classified based on their condition at the time of importation, without regard to their post-importation use. *See, e.g., Worthington v. Robbins,* 139 U.S. 337, 341 (1891). The second bedrock principle is that importers are entitled to fashion their goods so as to secure the most favorable duty rate. *See, e.g., United States v. Citroen*, 223 U.S. 407, 424 (1912); *Seeberger v. Farwell*, 139 U.S. 608, 611 (1891); *Merritt v. Welsh,* 104 U.S. (14 Otto) 694, 702 (1881).

The Federal Circuit ignored both of these principles when it reversed the considered judgment of the CIT and upheld the revocation by Customs of the classification ruling issued to Heartland. The revocation expressly relied on Customs's consideration of Heartland's post-importation processing of the imported merchandise and on Customs's rejection of Heartland's right to fashion the imported merchandise so as to enjoy favorable tariff treatment. Yet the Federal Circuit deferred to Customs and upheld the revocation without any reference to, let alone distinction of, the longstanding precedents of this Court. This case squarely presents the issue whether the principles articulated by this Court remain viable in the wake of the Federal Circuit's decision. The Court's review is imperative in order to reaffirm these fundamental principles and to restore consistency and predictability to import transactions and to the administration of customs law.

A. Heartland's Advance Classification Ruling

Heartland is a small sugar refiner located in Taylor, Michigan. Shortly after its establishment in early 1995, Heartland sought an advance classification ruling regarding a sugar syrup that it was considering importing from Canada. App., *infra*, 3a. Customs expressly encourages the trade community to seek advance rulings, which it describes as "definitive interpretation[s] of applicable law," 19 C.F.R. § 177.1(a)(1) (2001), so that "persons engaging in any [transaction] fully understand the consequences of that transaction prior to its consummation." *Id.* An advance ruling was critical for Heartland, because the classification would determine whether the sugar syrup was subject to a tariff-rate quota ("TRQ"), a prohibitive tariff some 7000 percent higher than the otherwise applicable rate. App., *infra*, 33a. If the sugar syrup were subject to a TRQ rate, it would be uneconomical for Heartland to import it. *Id.* at 32a-33a.

The ruling request was submitted to the attention of the National Import Specialist ("NIS"), the Customs Service's expert in classifying sugar products. Court of Appeals Joint Appendix ("C.A.") A0070-A0072. Customs considered Heartland's description of the ingredients and derivation of the sugar syrup — a liquified combination of granular raw sugar, of cane or beet origin, with molasses, of cane or beet origin, in proportions that would yield a brown syrup of approximately 93 percent polarity — and examined a sample supplied by Heartland. Customs then issued an advance ruling classifying the sugar syrup under HTSUS 1702.90.40, a classification outside the TRQ. App., *infra*, 2a-5a, 46a. That subheading encompasses all "sugar syrups" that are "derived from sugar cane or sugar beet," that do "not contain[ ] added flavoring or coloring matter," and that contain *more than six percent* "soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product)." Syrups differing only in that they contain *six percent or less* of soluble non-sugar solids are classifiable under HTSUS 1702.90.10 and 1702.90.20, TRQ subheadings that effectively bar imports. *Id.* at 32a-33a.

- Relying on Customs's "definitive interpretation" of the law, Heartland established its sugar syrup business, expending millions of dollars from mid-1995 to mid-1997 to develop the product, build a plant, and train workers. *Id.* at 3a-5a, 33a. In mid-1997, Heartland began commercially importing sugar syrup and refining it into liquid sucrose. *Id.* at 5a, 28a-29a. The molasses by-product of the refining process was lost in the process, sold for use in animal feed, or returned to Canada for re-use in the production of sugar syrup. *Id.* at 29a. Customs promptly conducted an unannounced inspection of Heartland's plant, taking samples of the sugar syrup and the liquid sucrose and examining the operations. *Id.* at 5a, 38a. The inspection confirmed that Heartland was complying fully with its ruling. *Id.* Customs informed two large sugar associations, which pressed the agency to halt Heartland's nascent import business, that Heartland's activities — the production, importation, and refinement of the syrup and the exportation of molasses by-product to Canada for use in making the syrup — were all "perfectly legal under the [advance] ruling and the principles followed in issuing the ruling." C.A. A1659-A1660.

B. The Revocation of Heartland's Advance Ruling

In January 1998, the two sugar associations, including respondent United States Beet Sugar Association, acting at Customs's suggestion, *id.*, formally petitioned Customs to revoke the advance ruling. C.A. A0091-A0105. The NIS reviewed the alternative classifications proposed by the petitioners and found them to be without merit, concluding that the advance ruling "is correct and should be affirmed." C.A. A0139-A0142.[1]

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[1] After examination of the sugar syrup by Customs's laboratory, the Customs chemist reported, "[W]e support 100% the classification provided by the NIS. Chemical analyses support classification in heading 1702.90.40." *See* App., *infra*, 68a n.7 (quoting C.A. A0330-A0331).

The NIS's legal analysis, however, did not end the matter. In the ensuing months, some Customs officials attempted to devise other justifications for reclassifying the sugar syrup under a TRQ classification. These other justifications were so specious, and the mission to revoke Heartland's advance ruling was so transparent, that the NIS wrote in August 1998: "This issue never was nor is about classification, although we keep spending endless time playing with words, reading meaning into provisions, [and] ignoring the GRIs [HTSUS General Rules of Interpretation]." C.A. A0298-A0299. Later that month, the Customs staff briefed the Commissioner of Customs on the classification of the sugar syrup, saying that "we would affirm the Heartland ruling based on the case law." C.A. A0312.

The case law, however, did not end the matter. At that juncture, in August 1998, the sugar associations, in their own words, received a "signal" from Customs that additional "political muscle" needed to be applied. C.A. A0578-A0579. The next month, 22 Senators jointly wrote to the Secretary of the Treasury, urging that he "direct" Customs to revoke Heartland's advance ruling. C.A. A0351-A0353. In response to the letter, some Customs officials intensified their efforts to justify a revocation. As the NIS observed in early 1999, however, C.A. A0373-A0374, the new justifications were no more colorable than their predecessors:

> As previously noted many times, the instant merchandise is a raw sugar derived from cane plus a molasses derived from cane or beet plus water, which produces a syrup derived from cane or beet. We have a specific provision for such a product. . . . You cannot start with your premise [that adding molasses is not permitted in HTSUS 1702.90.40], because it disregards the language in the tariff . . . .

The language in the tariff, however, did not end the matter. As one senior official of the Department of the Treasury warned

a Customs official after discussing the prolonged reconsideration of the Heartland ruling, "don't be surprised if the political types change our 200 year historical precedent of classifying goods in their condition as entered." C.A. A0362-A0363.

That observation proved to be prescient. In June 1999 Customs issued its proposed revocation. App., *infra*, 6a. *See* 33 Cust. B. & Dec. No. 22/23, at 42 (June 9, 1999). In commenting on the proposed revocation, Heartland submitted hundreds of pages of legal analysis, technical information, and expert affidavits. C.A. A0483-A0853 (omitting certain exhibits). Yet Customs signed the final revocation within 12 business days after the close of the comment period in August 1999. *See* 33 Cust. B. & Dec. No. 35/36, at 41, 47 (Sept. 8, 1999).

Customs justified the final revocation by introducing the "concept of tariff engineering," which it said "is based on the long standing principles of the tariff laws that merchandise is classifiable in its condition as imported and that an importer has the right to fashion merchandise to obtain the lowest rate of duty and the most favorable treatment." *Id.* at 44. Customs noted that under the latter principle, "an importer should be allowed to choose to import its merchandise at any step [of production] that obtains the most favorable treatment." *Id.* In the case of Heartland, however, Customs announced that these "long standing principles of the tariff laws" would not apply, because, in its view, "the importer has engaged in a process which is not a genuine step in manufacturing." *Id.*

Customs determined the "genuine[ness]" of the manufacture of the sugar syrup by considering whether the pre-importation mixing of molasses with granular sugar made "financial sense," whether Heartland's post-importation refinement of the sugar syrup into liquid sucrose resulted in a product competitive with sugar, and whether the sugar syrup had any post-importation "commercial use" other than for refinement into liquid sucrose. *Id.* at 44-46. In light of these considerations, Customs concluded that the addition of the molasses to the granular sugar in Canada was a "disguise or artifice" to "escape a higher rate

of duty" and that the molasses was a "foreign substance" whose exclusion from the sugar syrup dropped the percentage of soluble non-sugar solids below the threshold for HTSUS 1702.90.40, placing the sugar syrup into the classifications subject to the TRQ. *Id.* at 45, 53.[2]

C. The Proceedings Below

1. Heartland challenged the revocation before the CIT. The CIT granted Heartland judgment on the agency record, holding that Heartland's sugar syrup fell squarely within the "plain meaning" of HTSUS 1702.90.40, as provided for in the advance ruling. App., *infra*, 35a-42a. Undisputed evidence in the agency record established that Heartland's sugar syrup is made by liquifying a mixture of cane or beet granular sugar and cane or beet molasses to produce a syrup with more than six percent soluble non-sugar solids and no added flavoring or coloring matter. *Id.* at 36a. Applying "classic and long-standing principles of tariff classification which start with the application of the [GRIs] in the order in which they appear and following through with case law developed by the Supreme Court, courts of appeal, this court and its predecessor courts," the CIT concluded that "there can be little doubt that the correct classification of Heartland's syrup is within HTSUS 1702.90.40." *Id.*

The court rejected Customs's assertion that the molasses in Heartland's sugar syrup is a "foreign substance" that should be disregarded when assessing whether the solids content exceeds the six percent threshold set forth in HTSUS 1702.90. *Id.* at 39a-42a. The subheading directs that "any foreign substances

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[2] Customs also justified the revocation on the ground that the interpretation of the HTSUS provisions should be guided by the interpretation and history of the predecessor Tariff Schedules of the United States ("TSUS"), despite differences in language and structure. *Id.* at 45-46. This justification was not defended before the CIT (though for completeness the CIT addressed the issue, App., *infra*, 60a-61a), and was not an issue before the Federal Circuit.

that may have been added or developed in the product" should be excluded from the total soluble non-sugar solids in the syrup. *Id.* at 72a. But the court pointed out that this provision modifies the definition of sugar syrups "derived from sugar cane or sugar beets." *Id.* at 40a-41a. The uncontradicted record evidence established that the molasses used in Heartland's sugar syrup is derived from cane or beet sugar and that the sugar, molasses, and syrup "all have the same chemical ingredients, including impurities that occur naturally in sugar." *Id.* at 39a. Given that the molasses and the sugar syrup are both "derived from sugar cane or sugar beets," HTSUS 1702.90, the CIT reasoned that it would be nonsensical to conclude that the molasses is a substance "foreign" to the sugar syrup under the terms and structure of the HTSUS. *Id.* at 40a-41a.

The CIT also rejected Customs's position that molasses could be deemed "foreign" to sugar syrup based on consideration of the post-importation processing or commercial use of the sugar syrup. This position, the court found, contradicts longstanding precedents of this Court, establishing that goods must be classified based on their condition at the time of importation, without regard to the post-importation processing or use of the goods. *Id.* at 54a-55a (citing, among other cases, *Worthington v. Robbins,* 139 U.S. 337 (1891)). As the court explained, these precedents bar Customs from applying a higher rate of duty to an imported good based on manufacturing steps that alter the good *after* importation. Accordingly, the CIT followed *Worthington* and determined that the post-importation use of Heartland's sugar syrup furnished no lawful basis for reclassifying it outside of HTSUS 1702.90.40. *Id.* at 55a.

The CIT rejected as well Customs's position that, in determining whether molasses is "foreign" to the sugar syrup within the meaning of HTSUS 1702.90, Customs is entitled to consider whether the importer's motivation for producing the sugar syrup was to avoid the TRQ classifications. The CIT concluded that this position runs afoul of this Court's precedents establishing that importers have the right to fashion goods to

enjoy lower duties. *Id.* at 42a, 49a-50a (citing *Merritt v. Welsh,* 104 U.S. (14 Otto) 694, 701 (1881)). The CIT closely analyzed a series of decisions of this Court and the lower courts, each of which approved artificial steps in the manufacturing process undertaken to obtain the lowest rate of duty. *Id.* at 51a-53a. Finding no reason to depart from this unbroken line of precedent, the CIT "[f]ollow[ed] the Supreme Court in *Merritt.*" *Id.* at 51a. As the CIT stated in denying respondents' motions for reconsideration,

> Customs turned a blind eye to the controlling legal precedent that an importer has the right to fashion merchandise to obtain the lowest rate of duty. Ignoring that established bedrock of Customs jurisprudence rendered its conclusions arbitrary, capricious, an abuse of discretion and not in accordance with law.

Id. at 67a.

2. A panel of the Federal Circuit reversed. *Id.* at 1a-18a. Despite the CIT's extended discussion of the two bedrock classification principles established by decisions of this Court, the Federal Circuit did not address any of the Court's classification decisions. Instead, the Federal Circuit viewed the case as presenting only the narrow issue whether Customs's interpretation of the term "foreign substance" was entitled to deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001). App., *infra*, 13a.

The panel explained that deference may be accorded to Customs classification decisions under *Mead* to the extent that they have the "power to persuade." *Id.* (quoting 533 U.S. at 235). *Mead* directs that the following factors be evaluated in determining whether to extend deference to a Customs decision: the "thoroughness" and "expertness" of the decision, its "fit" with earlier and later pronouncements, the validity of its reasoning, and "any other sources of weight." *Id.* at 14a (quoting 533 U.S. at 228, 235). Although the revocation was

inconsistent with the advance ruling, conflicted with numerous decisions of this Court, and disregarded the expert views of the NIS for sugar products, the Federal Circuit concluded that it was "entitled to deference because of its persuasiveness." *Id.* Thus, the court deferred to Customs's interpretation of the term "foreign substance" and upheld the revocation classifying the sugar syrup under subheadings subject to the TRQ.

Heartland filed a timely petition for rehearing with suggestion for rehearing *en banc*. The court invited a response to the petition by both respondents. The court thereafter denied the petition without a published vote. *Id.* at 22a-23a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from the settled and longstanding decisions of this Court holding that goods are to be classified based on their condition as imported and that importers are entitled to fashion their goods to secure the lowest duty. By ignoring these bedrock principles of classification law, the Federal Circuit has left importers, the Customs Service, and the CIT without effective guidance for a broad range of import transactions. Under the decision in this case, the ultimate application of competing tariff provisions cannot be finally determined or even reliably predicted without consideration of extrinsic evidence of post-importation use, pre-importation manufacturing, and even the importer's motivations. Such considerations will engender lengthy administrative and judicial proceedings, burdening the conduct of international business. Indeed, past import transactions will be of marginal value in predicting the tariff treatment of future import transactions, even with respect to identical merchandise.

Further review is warranted in light of the clear departure of the decision below from the principles of classification law mandated by the decisions of this Court and in light of the exceptional importance of the question presented to the planning of commercial transactions and to the uniform and impartial administration of the customs laws.

A. The Decision of the Court of Appeals Conflicts with This Court's Decisions Requiring the Classification of Goods According to Their Condition as Imported

1. The principle that imported merchandise is dutiable in its condition as imported, regardless of "what is going to be done with it afterwards," is "so basic [that] it hardly needs to be mentioned in any discussion of a classification problem by judges, officials, or lawyers having any serious involvement in such matters." *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1577 (Fed. Cir. 1989). This Court first announced that principle over a century ago in *Worthington v. Robbins,* 139 U.S. 337 (1891). The merchandise at issue in *Worthington* was white hard enamel. *Id.* at 340. The importer was a watchmaker, and intended to use the white hard enamel only for the purpose of making watches. *Id.* at 340-341. In light of that intended use, the Customs Service classified the enamel as "watch material[ ]" and assessed a duty of 25 percent. *Id.* at 338. The importer contended that the merchandise should be classified as an article "manufactured in whole or in part, not herein enumerated or provided for," and assessed a duty of 20 percent. *Id.*

This Court agreed with the importer, concluding that, in its condition as imported, the white hard enamel did not "bear marks of its special adaptation for use in making watches." *Id.* at 341. To the contrary, the product "in the form or condition as imported, cannot be used . . . for any purpose whatever of practical use" without a series of post-importation manufacturing steps. *Id.* at 338. Thus, the only basis Customs had for classifying the merchandise as "watch material" was its knowledge of the post-importation use of the goods. On Customs's approach to classification, the same white hard enamel could be classified differently depending on available evidence of its use after importation. "In order to produce uniformity in the imposition of duties," the Court rejected this approach and adopted instead a straightforward rule requiring that "the dutiable classification of articles imported . . . be

ascertained by an examination of the imported article itself, in the condition in which it is imported." *Id.* at 341.[3]

The principle that articles must be classified according to their condition at importation, without regard for post-importation processing or use, has been a cornerstone of customs law since *Worthington*. Indeed, until the decision in this case, a long line of cases of the Federal Circuit, the CIT, and their respective predecessor courts consistently applied this principle to a broad range of imported goods. *See, e.g., Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (applying "well settled law that merchandise is classified according to its condition when imported"; holding that photocopier toners and

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[3] This rule does not apply to a discrete category of tariff classifications in which Congress expressly directed that Customs consider the post-importation use of the goods in determining classification. *See Leonard Levin Co. v. United States*, 27 C.C.P.A. 101, 106 (1939); *Hardwood Mfg. Co. v. United States*, 7 CIT 288, 292 (1984). For example, non-TRQ HTSUS subheadings 1703.10.30 and 1703.90.30 expressly require the consideration of post-importation use: they apply to molasses, with more than six percent soluble non-sugar solids, "imported for (a) the commercial extraction of sugar or (b) human consumption." App., *infra*, 73a; *see* Additional U.S. Note 10 to HTSUS Chapter 17. By contrast, the HTSUS subheading at issue in this case, 1702.90.40, makes no reference to the post-importation use of the product. *See* App., *infra*, 72a. The explicit reference to use in the two HTSUS 1703 subheadings is thus strong evidence that Congress knew how to articulate a use classification for similar sugar products when it wished to do so. In light of the existence of use provisions in other subheadings, the absence of such a provision in HTSUS 1702.90.40 must be presumed to have been deliberate. "Nothing, indeed, but a different intent explains the different treatment." *Lindh v. Murphy*, 521 U.S. 320, 329 (1997) (explaining that when separate sections of a statute address similar issues, any differences in treatment are presumed to be deliberate). The CIT noted the critical difference between use provisions and the provisions of HTSUS 1702.90.40, App., *infra*, 38a n.13. The Federal Circuit did not.

developers were correctly classified as "chemical preparations" rather than "unmixed products," despite importer's argument that the goods had no post-importation use other than to be mixed together); *United States v. Baker Perkins, Inc.*, 46 C.C.P.A. 128, 130-131 (1959) (rejecting importer's contention that, because a motor would ultimately be installed in it, a coffee grinder should be classified as an article with an electrical element or device); *Hardwood Mfg. Co. v. United States*, 7 CIT 288, 289 (1984) (citing *Worthington* and holding that imported wood and rattan frames were properly classified as "unspun fibrous vegetable materials," rather than as "clock cases and parts thereof," despite their post-importation use, after additional manufacturing steps, as clock cases); *Cook v. United States*, 49 Cust. Ct. 11, 13, 14 (1962) (rejecting Customs argument that inedible frost-damaged wheat should be classified as fit for human consumption simply because post-importation processing transformed it into flour, observing that "[t]his argument proceeds in circles").

In the present case, instead of following the clear mandate of the *Worthington* line of cases, the Federal Circuit upheld a Customs revocation that bases the classification of Heartland's merchandise on its *post-importation* use. Simply put, it is only because *after importation* the sugar syrup was refined into liquid sucrose (which Customs found to be competitive with sugar) and because *after importation* that refining generated a molasses by-product, some of which Heartland returned to Canada, that Customs claimed that the mixing of molasses with granular sugar in Canada introduced a "foreign substance" into the sugar syrup. App., *infra*, 6a-8a, 20a-21a. *See* 33 Cust. B. & Dec. No. 35/36, at 45, 49 (Sept. 8, 1999).

Specifically, Customs declared that Heartland's sugar syrup could not be classified under HTSUS 1702.90.40 unless the agency was persuaded that the product had a "commercial identity" or a "commercial use" in its condition as imported. 33 Cust. B. & Dec. No. 35/36, at 49. To make this determination, Customs purported to follow the product in commerce to

examine how it was used after importation. Based on the refinement of the imported sugar syrup into liquid sucrose and the generation of a molasses by-product of which some was exported to Canada, Customs declared that the sugar syrup had no "commercial identity" and that the mixing of molasses with granular sugar in Canada introduced a "foreign substance" into the resulting sugar syrup. *Id.* at 49, 53. In short, as the Federal Circuit stated, Customs took the position that, "as a matter of law, it could consider the product's uses when determining [the syrup's] proper classification." App., *infra*, 6a.

Yet such considerations are foreclosed by *Worthington* and its progeny. As the Federal Circuit's predecessor court stated in rejecting an importer's argument that raw sugar imported for use as animal feed should be classified based on that post-importation use rather than under the classification for "sugars":

> It seems to us that to sustain [the importer's] position it would require us to qualify this [tariff] provision by judicial construction to read "except raw sugar not imported to be further refined or for human consumption." We do not believe such a construction is warranted. . . . The intent of Congress throughout the history of tariff legislation on sugar since 1913 has been to assess duties on the basis of the polariscopic sugar degree content, not upon the ultimate or intended use of the sugar.

Robert G. Lynch Co. v. United States, 49 C.C.P.A. 74, 79 (1962). Or, as this Court stated in *United States v. Citroen*, 223 U.S. 407, 416 (1912), when Congress has provided a specific tariff classification for an article, courts "are not at liberty to make another." Here, as the CIT observed, "Congress has provided a clear and unambiguous test: the quantity of soluble non-sugar solids." App., *infra*, 51a. Congress left no room in the terms of HTSUS 1702.90.40 for consideration of post-importation use, and neither Customs nor the Federal Circuit is

at liberty to interject such consideration where the classification provides for none.[4]

2. In justifying its interpretation of "foreign substance," Customs also claimed that the *pre-importation* process of manufacturing the sugar syrup was relevant. The court of appeals deferred to Customs's definition of "foreign substance" as any "substance that [is] foreign to the sugar syrup at the relevant stage of the refining process." *Id.* at 16a. Under this interpretation, the dispositive criterion is not the condition of the product at importation, but rather the particular manufacturing process used to prepare the product. Apparently, depending on how it is manufactured, the identical sugar syrup may now be classified under HTSUS 1702.90.40 and assessed at a non-TRQ rate, or, alternatively, it may be classified under HTSUS 1702.90.10 and 1702.90.20 and assessed at the TRQ rate, which is some 7000 percent higher.[5]

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[4] Customs cited four cases in support of its revocation, each of which was found by the CIT to be inapplicable. *Id.* at 56a-59a. The Federal Circuit deferred to Customs's revocation without making any attempt to rehabilitate its jurisprudential underpinnings.

[5] Customs's claim that the mixture of molasses with granular sugar was "foreign" at the "relevant stage" of the "refining process" was riddled with errors of fact and law. The record was replete with evidence that such mixing was commonplace in the production of sugar products such as Heartland's sugar syrup: affidavits of sugar experts and statements in leading reference works contradicted Customs's assertion. *Id.* at 47a-49a. The Federal Circuit failed to probe the record in this regard, but the CIT did so and found that "Customs had no basis to conclude that combining raw sugar with molasses was not a legitimate step in a refining operation." *Id.* at 49a.

Moreover, as the CIT expressly noted, *id.* at 41a, Customs interpolated the term "refining process" into the tariff provision, which actually makes no mention of any particular manufacturing process but only requires that the sugar syrup be "derived" from cane or beet. *See id.* at 72a. The Federal Circuit, while discerning "persuasiveness"

The Federal Circuit's decision in *Heartland* to consider pre-importation processing cannot be reconciled with this Court's decision in *Citroen*. The *Citroen* Court reaffirmed that merchandise is to be classified according to its condition as imported, and rejected consideration of the pre-importation process of manufacture of the merchandise. *Citroen* involved an unstrung set of matched pearls that had been drilled for use as a necklace. The importer maintained that the pearls should be classified as "[p]earls in their natural state, not strung or set," dutiable at the rate of 10 percent. 223 U.S. at 413. Customs, however, classified the goods as "pearls set or strung" and assessed a 60 percent duty. Customs rested on undisputed evidence that, prior to their importation, the pearls had been strung from time to time on a silk cord for the benefit of prospective purchasers, and indeed had been worn as a necklace by the person for whom the pearls were subsequently imported. It was also undisputed that, following importation, the pearls were restrung and used as a necklace. *See id.* at 413-414.

Citing the "well established" rule that goods must be classified based on the condition in which they are imported, the *Citroen* Court held that consideration of the process of manufacture of the pearls before their importation was not relevant; the issue was solely whether the pearls, in their imported condition, fell within the "not strung" tariff classification. *Id.* at 415. The Court found that Customs's alternative approach,

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in Customs's revocation, *id.* at 13a, ignored the interpolation at its core. When Congress wished that a sugar product classification depend in part on whether the product was manufactured through a "refining process," it so stated in the relevant tariff classification: HTSUS 1703.10.30 and 1703.90.30, for example, both refer to molasses "resulting from the extraction or refining of sugar." *Id.* at 73a. But the statute "makes no distinction of that sort," *Citroen*, 223 U.S. at 423, when it comes to classifying sugar syrups of the kind imported by Heartland. *See Robert G. Lynch Co.*, 49 C.C.P.A. at 79 (declining to interpolate language into tariff classification "by judicial construction").

based on "extrinsic evidence" of pre-importation events, "encourages partiality, promotes injustice, and has broken down in practical application." *Id.* at 422-423 (internal quotations omitted). By contrast, classification based solely on the imported condition of the article "provides a simple and workable test, permitting certainty and impartiality in administration which should preeminently characterize the operation of tariff laws." *Id.* at 424. Applying this test to the unstrung pearls, the Court concluded that, in their condition as imported, they were uniquely described by the tariff classification for pearls "not strung or set." *See id.* at 415. As the Court observed, it is not for the Customs Service or the courts to be "concerned with the reason for the [statutory] distinction; it is enough that Congress made it." *Id.*

The conflict between the "foreign substance" interpretation upheld by the court of appeals and this Court's precedents is inescapable. *Citroen* would be decided differently under the approach adopted by the Federal Circuit in this case. In *Citroen*, the Court determined that unstrung pearls were properly classified as such based on their condition as imported, notwithstanding that they had been strung prior to their importation. But under the *Heartland* rule, Customs could successfully argue that the unstringing of the pearls should be disregarded for classification purposes, just as the addition of molasses to sugar was disregarded in *Heartland*, because in both instances the change in the product was, in Customs's view, an abnormal reversal of the manufacturing process. App., *infra*, 16a-17a. Likewise, the *Heartland* rule would have permitted Customs to assert that the unstrung pearls in *Citroen* should be classified as pearls "set or strung" because it was clear that, after importation, the unstrung pearls had no commercial purpose other than for use in making a pearl necklace. Further review by this Court is warranted to correct the Federal Circuit's unexplained departure from the principle that imported products are to be classified according to their condition as imported.

B. The Decision of the Court of Appeals Conflicts with This Court's Decisions Entitling the Importer to Fashion Goods so as to Benefit from Favorable Tariff Treatment

1. The Federal Circuit's deferential construction of the term "foreign substance" also collides with a second bedrock of classification law: that importers have the right to fashion their goods so as to secure the lowest duty rate. This principle was established by this Court in a sugar case decided more than a century ago, *Merritt v. Welsh,* 104 U.S. (14 Otto) 694, 702 (1881).

The importer in *Merritt* colored its sugar by introducing molasses in the production process. *See id.* at 701. Under the classifications in effect at that time, the darker color of the sugar made it eligible for a lower duty rate. *See id.* at 700. Foreshadowing the argument it would make a century later with respect to Heartland's merchandise, Customs took the position that the dark color imparted by the molasses should be disregarded for classification purposes because the addition of molasses served no commercial purpose and had been added solely to achieve the lower duty rate. The Court found no merit in that contention, stating, *id.* at 701-702:

> Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? . . . If [instead of a color standard] the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend.

Thus, *Merritt* expressly recognized the lawfulness of what Customs referred to in its Heartland revocation as "tariff

engineering," or the practice of manufacturing a product with an eye toward securing the most favorable duty rate:

> It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved.

Id. at 704. Manufacturing goods in such a manner is perfectly legitimate, the Court held, so long as the imported goods are "truly invoiced and freely and honestly exposed to the officers of customs for their examination." *Id.*

The Court adhered to this position in *Seeberger v. Farwell*, 139 U.S. 608 (1891). The product in question there was dress goods made of 94 percent wool and 6 percent cotton. Customs contended that there was no commercial purpose for the importer's introduction of such a small proportion of cotton into the otherwise woolen goods, and that the importer's objective was solely to obtain a lower duty than was available for goods made entirely of wool. *See id.* at 610-611. The Court held that, even assuming that Customs's contention were correct as a matter of fact, it was irrelevant as a matter of classification law: "manufacturers and importers ha[ve] the right . . . to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." *Id.* at 611.

The following year, the Court decided *United States v. Schoverling*, where the merchandise in question was gunstocks that the importer intended to manufacture into shotguns. *See* 146 U.S. 76, 77 (1892). The evidence indicated that a principal of the importer, a Mr. Schoverling, was also a principal of another firm that was importing barrels, and that the two firms had agreed to manufacture shotguns from the separately imported stocks and barrels. Customs alleged that the firms

were "colluding" to "evad[e] the payment of duties" that would have been due had they imported completed shotguns. *Id.* at 79. To remedy that alleged abuse, Customs argued that the gunstocks should be classified as fully assembled shotguns and should be assessed at the higher rate. *Id.* at 77. But the Court gave short shrift to that contention, stating:

> [T]he intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation. . . . [T]he dutiable classification of the gunstocks imported must be ascertained by an examination of them in the condition in which they are imported.

Id. at 81-82. Citing both *Merritt* and *Worthington*, the Court concluded that it was perfectly appropriate for the importer to achieve a favorable tariff rate by choosing to import separate shotgun components and then assemble them to make shotguns. Accordingly, the Court held that the goods were correctly classified as "finished gunstocks." *Id.*

The Court also reaffirmed the *Merritt* principle in *United States v. Citroen*, 223 U.S. 407 (1912). Despite Customs's complaint that the importer in *Citroen* unstrung the pearls solely to benefit from a lower tariff rate, and despite the record evidence that the pearls had been strung before importation and were restrung afterwards, the Court held that the pearls must be classified as "not strung." *See id.* at 415 ("when the article imported [*i.e.*, unstrung pearls] is not the article described as dutiable at a specified rate [*i.e.*, strung pearls], it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate").[6]

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[6] Ironically, the concurring opinion of the Federal Circuit panel below turned the cited *Citroen* quotation on its head, using it to

Since *Citroen*, the principle that the importer may fashion its product so as to enjoy favorable tariff treatment has become firmly rooted in classification law and has been consistently applied in numerous decisions of the lower courts. *See, e.g., Robert G. Lynch Co. v. United States*, 49 C.C.P.A. 74, 77 (1962) (concluding that the importer's reasons for adding coloring to raw sugar had no bearing on the classification of the product); *Michaelian & Kohlberg, Inc. v. United States*, 22 C.C.P.A. 551, 555-558 (1935) (holding that embroidered oriental rugs were "fabrics and articles embroidered" regardless of the importer's motive in adding the embroidery); *Tropicana Prods., Inc. v. United States*, 789 F. Supp. 1154, 1159 (CIT 1992) (citing *Citroen* and explaining that the tariff laws do not proscribe manufacturing steps implemented with a "duty-reduction motivation"); *Wiley v. United States*, 56 Cust. Ct. 331, 332-333, 337 (1966) (pistol barrels and frames imported separately but on the same day and by the same importer, where "mere attachment" of barrels to frames would form complete pistols and be subject to a higher duty rate, were classifiable as parts of pistols, not as complete pistols: "the importer had the right to have his goods manufactured or imported in the manner which would produce the lowest possible duty assessment"); *Mercantile Stores Co. v. United States*, 36 Cust. Ct. 354, 357 (1956) (holding that it was permissible for importer to secure a lower duty rate for tablecloths and napkins by loosely stitching machine-made lace to them).

In upholding the revocation of Heartland's advance ruling, the court of appeals utterly disregarded this long line of precedent. As the court correctly observed, the revocation purported to discount the molasses content of Heartland's sugar

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support the proposition that, if Heartland had the sugar syrup "prepared for the express purpose of being imported at a lower rate," then that purpose must be adversely considered in determining classification. App., *infra*, 19a. Had this been the holding of *Citroen*, however, the pearls, unstrung prior to importation in order to obtain a lower-duty classification, would have been classified as "strung."

syrup because, in Customs's view, molasses had been included in the mixture "to escape a higher rate of duty such as a quota or tariff rate." App., *infra*, 8a (quoting 33 Cust. B. & Dec. No. 35/36, at 44-45). Although the precedents contravened by this Customs determination were extensively addressed both during the administrative proceedings culminating in the revocation, *id.*, and in the opinion of the CIT, *id.* at 49a-55a, the Federal Circuit panel found it unnecessary to examine any of this Court's decisions establishing the right of importers to fashion their goods to obtain the lowest duty. That refusal to apply established precedent is particularly remarkable because the manufacturing process that the court of appeals found was introducing an impermissibly "foreign" substance — the mixing of molasses with raw sugar — was the very one that this Court found to be perfectly appropriate in *Merritt*, *see* 104 U.S. at 697, 701-702, and because the motivation of the importer that Customs believed to be of such importance — a desire to minimize the duties imposed on imported sugar products — was one that this Court held was absolutely irrelevant to the classification issue, *see id.* at 704.[7]

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[7] Nor is the Customs revocation, or the Federal Circuit's decision, saved by Customs's assertion that the mixing of molasses with granular sugar in Canada did not make any "financial sense." 33 Cust. B. & Dec. No. 35/36, at 45. By Customs's reasoning, apparently, only if the pre-importation manufacturing process continuously adds value to a product can the importer of the product benefit from favorable tariff treatment.

This reasoning, however, to which the Federal Circuit deferred, flies in the face of this Court's instructions. In *Merritt*, the Court expressly found nothing untoward in adding molasses to impart to a sugar product "a low grade of color," 104 U.S. at 704, though it might make no "financial sense" to do so apart from the tariff benefit. In *Seeberger*, the Court did not find it necessary to determine whether the addition of some cotton to a woolen fabric would enhance the value of the product upon importation. In *Schoverling*, the Court did not consider the classification of the gunstocks to be dependent on

The court of appeals and the Customs Service were either oblivious to or indifferent to the contradiction between the *Merritt* line of cases and the reasoning of the revocation, but the contradiction did not escape the attention of the CIT. After reviewing the facts and the reasoning in *Merritt*, the CIT determined that the case was controlling precedent. App., *infra*, 49a-51a. Although the tariff code has changed since *Merritt* was decided, so that duties on sugar are no longer assessed based on the product's color, the CIT recognized that the basic principles of tariff classification remain unchanged. *Id.* at 50a-51a. Importers may still manufacture their goods with an eye toward securing the most favorable tariff classification, and that includes "employ[ing] an extra quantity of molasses" to render a sugar product less dutiable. *Id.* at 50a (quoting *Merritt*, 104 U.S. at 704). As the CIT noted, "There was uncontroverted evidence on the [*Heartland*] record that [the] manufacturing process was common in sugar refining operations, but even if it were not, the motive of the importer in fashioning his or her merchandise is simply not a relevant inquiry." *Id.* at 53a.

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whether their assembly into finished shotguns would have been less expensive, and therefore more financially "sens[ible]," abroad. And in *Citroen*, the Court expressly rejected Customs's contention that, once having been strung prior to importation, a set of pearls could not be unstrung to secure the lower duty rate applicable to unstrung pearls. *See* 223 U.S. at 416. The *Citroen* Court did not consider it relevant to determine whether rendering the pearls "unstrung" made any "financial sense" apart from the tariff benefit.

As the *Citroen* Court observed, the tariff provision resulting in the higher duty for "strung" pearls did not use a "generic definition which could be deemed to define pearls previously strung though imported unstrung," *id.*, but instead described pearls that were "set or strung" at the time of importation, *see id.* The TRQ provisions at issue in this case, HTSUS 1702.90.10 and 1702.90.20, App., *infra*, 72a, similarly contain no generic definition permitting Customs — or the court of appeals — to consider pre-importation processing, regardless of its effect on tariff rates.

To the extent that Congress finds an importer's practice in fashioning a product to obtain favorable tariff treatment to be inconsistent with the legislative intent, Congress alone is authorized to amend the statute. Customs cannot override the existing tariff schedules. *Id.* at 50a-51a (citing *Merritt*, 104 U.S. at 700). Finding the revocation to be sharply at odds with *Merritt*, the CIT properly struck down the revocation. *Id.* at 51a. The Federal Circuit's failure to follow *Merritt* and its progeny warrants this Court's review.

2. The principle that an importer may fashion its products so as to achieve favorable tariff treatment is subject to the condition that the importer not engage in "disguise or artifice." *Citroen*, 223 U.S. at 415. In its revocation, Customs claimed that Heartland had done precisely that, 33 Cust. B. & Dec. No. 35/36, at 45, but neither the CIT nor the Federal Circuit concurred. The CIT exhaustively reviewed the record evidence and the case law, App., *infra*, 46a-60a, and found "no basis" for Customs's conclusion, *id.* at 49a. The CIT noted that Heartland had sought and received an advance classification ruling, had been subjected to an unannounced Customs inspection, had submitted samples of the product in question, and had repeatedly been found to be in compliance with its ruling and with the law.

The majority of the Federal Circuit panel did not disturb the CIT's holding in this regard. Only the concurring opinion, joined by neither member of the panel majority, endorsed the "disguise or artifice" characterization.[8] Accordingly, the excep-

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[8] The concurring opinion rested on a number of factual and legal errors. For example, the opinion stated that Heartland engaged in a two-step process, in which it "removed the molasses" from the imported sugar syrup and then "refined the remaining syrup," *id.* at 18a-19a, a description nowhere supported by the record. *Compare id.* at 28a-29a. The concurring opinion also stated: "If Heartland had fully informed Customs of how it intended to deal with the imported sugar syrup, we now know that Customs would not have ruled the

tion for "disguise or artifice" cannot avail the revocation, or the Federal Circuit's upholding of the revocation, in the face of the longstanding principle that importers are entitled to fashion their products so as to enjoy favorable tariff treatment. This Court should grant the petition for writ of certiorari in order to reaffirm the teachings of *Merritt* and *Citroen*.

C. The Issues Presented are of Exceptional Importance to the Planning of Commercial Transactions and to the Administration of the Customs Laws

The Federal Circuit's disregard of the two bedrock principles of classification law will cripple the trade community's ability to plan international commercial transactions. It also will replace certainty and objectivity in the administration of customs laws with a degree of unpredictability and discretion that will lead importers and the Customs Service to the courts with much greater frequency. Because of the Federal Circuit's exclusive appellate jurisdiction over customs law controversies, 28 U.S.C. § 1295(a)(5) (2000), the repercussions of the *Heartland* case will be felt by importers and consumers of imported goods in every state and by Customs officials in ports of entry throughout the country.

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import was subject to the lower duty." *Id.* at 21a. This statement is at odds with the record evidence that, even after being "fully informed" of Heartland's operations by reason of its fall 1997 inspection, Customs did not revoke the advance ruling for two full years, and then only after fierce internal debate and intense external pressure. *See* C.A. A1659-A1660, A0139-A0142, A0298-A0299, A0312, A0373-A0374, A0362-A0363. Finally, the concurring opinion's view that Heartland engaged in disguise or artifice because the mixing of molasses with granular sugar in Canada "served no manufacturing or commercial purpose," App., *infra*, 19a, ignores the *Merritt*, *Seeberger*, *Schoverling*, and *Citroen* decisions of this Court, all of which found no legal impediment to classifying products without regard for the "manufacturing or commercial purpose" of their particular manufacturing process.

Heretofore, businesses considering import transactions could reliably determine the classification of the imported product, and consequently its tariff rate, based on the product's imported condition. Furthermore, if a range of possible tariff classifications were possible, the importer could fashion its product so as to benefit from a classification with lower tariffs. The Federal Circuit's decision in *Heartland* extinguishes these guiding lights and leaves the trade community groping in the darkness. Now, apparently, a product may be classified according to its imported condition, or according to some post-importation use, regardless whether the tariff classification makes any reference to use. And now, apparently, any attempt by the importer to import a product in a condition that enjoys a low tariff rate may be met with a Customs Service determination that the motivations of the importer are impermissible. The ability of an importing business to plan its commercial transactions is thus severely impaired.[9]

Without the two bedrock principles in place, the administration of the customs laws becomes fraught with uncertainty. The Customs Service, rather than focusing on the products in the condition in which they cross the border, is now invited by the Federal Circuit to expand its role into management consulting (considering the economic rationality of pre-importation manufacturing processes), factory inspection (investigating post-importation processing), and market analysis (determining whether a particular post-importation use is sufficiently "commercial"). Products identical in their condition as

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[9] Until *Heartland*, obtaining an advance classification ruling was the principal way that prospective importers could reduce the uncertainty of classification and base their transactional planning on a "definitive interpretation of applicable law." 19 C.F.R. § 177.1(a)(1) (2001). But the Federal Circuit's decision signals that even a party relying on an advance ruling, as Heartland did, is not protected by the two fundamental principles of classification law. Accordingly, importers that have received and relied on advance rulings now face the real prospect that their business is resting on legal quicksand.

imported may now be subject to different classifications depending on an array of considerations, ensuring substantial inconsistency, controversy, inconvenience, delay, and expense.

As the Federal Circuit itself foresaw in rejecting an importer's claim that a product should be classified in consideration of its post-importation processing:

> If the rule [that imports are classified in accordance with their condition as imported] were otherwise, not only could the same product be subject to different duty rates depending on its intended end use, but Customs would be flooded with affidavits or other evidence of differing intended uses.

Mita Copystar Am., 21 F.3d at 1082. But variable treatment of identical imports is something that Congress never intended, except with respect to certain discrete categories of merchandise for which it crafted an express use provision. *See Simod Am. Corp.*, 872 F.2d at 1577 ("[i]t would be a startling breach if two identical entries were classified differently because, after importation, one was" processed in one fashion and the other in another).

Variability in classification makes it much more likely that classification determinations will ultimately be made by the courts, long after the transactions that gave rise to the classification disputes. Even before the *Heartland* decision, delays in the issuance of Customs rulings were "significant problems," causing "concerns [in] the trade community" and threatening to "inhibit [importers] from making timely economic decisions affecting their livelihood." U.S. General Accounting Office, "U.S. Customs Service: OR&R [Office of Regulations and Rulings] Needs to Resolve Timeliness and Data Problems Involving Headquarters Rulings," GAO/GGD-00-181, at 6, 7 (table 1), 9, 13, 16 (Sept. 2000) (finding that two-thirds of headquarters' prospective rulings took longer than 120 days to issue); *see* Testimony of Commissioner of Customs Robert C.

Bonner to House Appropriations Committee, Subcommittee on Treasury, Postal Service, and General Government, at 15 (Feb. 27, 2002) (www.customs.treas.gov/news/news.htm, visited Apr. 1, 2002) (describing "the time it takes for Customs to issue commercial rulings" as "unacceptable"). The evidentiary considerations and administrative discretion introduced by the Federal Circuit's decision promise only to compound the delays surrounding the issuance of rulings and to render the results more complicated and controversial. With the CIT already bearing a caseload exceeding 1200 cases per active judge, *see* Administrative Office of the United States Courts, "Judicial Business of the United States Courts: 2001 Annual Report of the Director," at 266, table G-1 (as of September 30, 2001, CIT had over 9900 pending cases), judicial review of classification disputes, fraught with post-*Heartland* issues of pre-importation motivation and post-importation use, will burden both the courts and the trade community.

Both Congress and this Court have stressed the importance of clarity, uniformity, and impartiality in the administration of the Nation's customs laws. In the Tariff Act of 1930, Congress provided that the Secretary of the Treasury is to "establish and promulgate such rules and regulations not inconsistent with the law [and] disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon." 19 U.S.C. § 1502(a) (2000). And in enacting Title VI of the North American Free Trade Agreement Implementation Act of 1993, entitled "Customs Modernization," Congress underscored, in Customs's words, "the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations." 33 Cust. B. & Dec. No. 35/36, at 41. *See* Pub. L. No. 103-182, 107 Stat. 2057 (codified in scattered sections of 19 U.S.C.). In articulating the two bedrock principles of classification law, this Court acutely observed in *Merritt*: "Uncertainty and ambiguity are the bane

of commerce. Discretion in the custom-house should be limited as strictly as possible." 104 U.S. at 702.

Unless this Court acts, Heartland will be only the first of many American businesses to be prejudiced by the inability to obtain clear, timely, and impartial classification of imported merchandise. American business has become increasingly global in its sourcing of raw materials, components, and finished goods. Over 400,000 U.S. companies are directly involved in importing goods, U.S. General Accounting Office, "Customs Service Modernization: Impact of New Trade Compliance Strategy Needs to be Assessed," GAO/GGD-00-23, at 5 (Dec. 1999), and thousands more rely on those imports for their own manufacturing and marketing businesses. In Fiscal Year 1999, Customs processed "over 21 million import entries with a value of $977 billion," U.S. General Accounting Office, "Major Management Challenges and Program Risks: Department of the Treasury," GAO-01-254, at 31 (Jan. 2001), and by 2001 the value of U.S. imports of goods exceeded $1.14 trillion for the calendar year. Bureau of Economic Analysis, U.S. Department of Commerce, "U.S. International Trade in Goods and Services, Ex. 1 (Jan. 2002) (www.bea.gov/bea/newsrel/trad0102.htm, visited Apr. 1, 2002). Each entry must be classified, either by Customs or, with the benefit of Customs rulings and case law, by importers. Thus, difficulty in ascertaining the correct classification of imports promises to impose substantial costs on American business: importers will be unable to determine whether to initiate, or continue, importations, while consumers of imports will be unable to plan their purchases and pricing.

The Court should review the judgment of the Federal Circuit in order to restore the "simple and workable test[s]," *Citroen*, 223 U.S. at 424, that have guided tariff classifications for well over a century, and to safeguard for importers nationwide that "certainty and impartiality in administration which should preeminently characterize the operation of tariff laws." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

In the
United States Court of Appeals
for the Federal Circuit

NOS. 00-1287, 00-1289

HEARTLAND BY-PRODUCTS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant,

and

UNITED STATES BEET SUGAR ASSOCIATION,

Defendant-Appellant.

Appeal from the United States Court
of International Trade.
No. 99-09-00590 - **Judith M. Barzilay**, *Judge.*

ARGUED FEBRUARY 9, 2001 – DECIDED AUGUST 30, 2001

Before NEWMAN, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

SCHALL, *Circuit Judge*.

The United States and the United States Beet Sugar Association (collectively, "Appellants") appeal the decision of the United States Court of International Trade in favor of Heartland By-Products, Inc. ("Heartland") that declared that the classification of Heartland's sugar syrup by the United States Customs Service ("Customs") under subheadings 1702.90.10/20 of the Harmonized Tariff Schedule of the United States ("HTSUS") was unlawful and that held that the syrup is properly classified under subheading 1702.90.40 of the HTSUS. *Heartland By-Prods., Inc. v. United States,* 74 F. Supp. 2d 1324 (Ct. Int'l Trade 1999). Because we conclude that Customs' classification ruling has power to persuade under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), we reverse.

BACKGROUND
I.

Under the HTSUS, the volume of sugar imported into the United States is controlled by a Tariff Rate Quota ("TRQ"). *See* Additional U.S. Notes, 17 HTSUS (2000). Sugar entered under the quota is subject to a lower rate of duty than sugar entered above the quota. *Id.* Sugar syrups are classified under heading 1702:

> **1702**
> Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel:
> * * *
>
> **1702.90**
> Other, including invert sugar:
> Derived from sugar cane or sugar beets:
> Containing soluble non-sugar solids (excluding any foreign substances that may have been added or

developed in the product) equal to 6 percent or less by weight of the total soluble solids:

1702.90.05
Described in general note 15 of the tariff schedule and entered pursuant to its provisions.[1]

1702.90.10
Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions.[2]

1702.90.20
Other.

Other:

1702.90.35
Invert molasses.

1702.90.40
Other.

HTSUS (2000). Syrups classified under 1702.90.10 HTSUS and 1702.90.20 HTSUS are subject to the TRQ, whereas syrups classified under 1702.90.40 HTSUS are not.

II.

Heartland was established in 1995 in Taylor, Michigan. Shortly after being established, Heartland sought an advance ruling from Customs regarding the classification of a sugar syrup it was considering importing from Canada. *See* 19 C.F.R. § 177.1 (1995) (providing for requests for tariff classification rulings). Heartland described the sugar syrup as consisting of sugar, water, and soluble non-sugar solids consisting of approximately 70 percent by weight

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[1] General note 15 pertains to the TRQ.

[2] Additional U.S. note 5 pertains to the TRQ.

of dissolved solids and approximately 30 percent by weight of water. Heartland indicated that the syrup meets the following analysis, by weight, on a dry solid basis:

> approximately 93.5% but not equal to more than 94% of sugar cane and/or beet origin of which unintentionally created reducing sugars (invert) make up less than 5%
>
> and
>
> approximately 6.5% but not equal to or less than 6.0% of soluble non-sugar solids of cane and/or beet origin.

Heartland stated that it believed that the syrup should be classified under 1702.90.40 HTSUS. Heartland explained that the syrup falls under 1702.90 HTSUS because it is not a syrup of lactose, maple, glucose or fructose and, therefore, does not fall under the prior subheadings of 1702. Heartland asserted that the syrup falls under 1702.90.40 HTSUS because it contains more than 6% by weight of soluble, non-sugar solids with no foreign substances, and is not a molasses.

In response to Customs' request for information on how the syrup is made, Heartland described the manufacturing process as follows:

> 1. Granular raw sugar would be combined with molasses, of cane or beet origin, in the correct proportions to produce a brown sugar of approximately 93 percent polarity. To ensure adequate mixing, the granular raw sugar would be sprayed with the molasses and run through a blending screw.
>
> 2. The 93 percent polarity brown sugar would then be dissolved in hot water within an agitated and heated vessel to produce a simple syrup of approximately 70% by weight dissolved solids.

Customs agreed with Heartland's proposed classification, and issued a ruling letter classifying the syrup under 1702.90.40

HTSUS. N.Y. Ruling Letter 810329 (May 15, 1995) ("New York Ruling Letter"). With this classification, Heartland's sugar syrup was not subject to the TRQ.

Relying on this ruling, Heartland established a business around the manufacture and importation of the sugar syrup. Heartland began its refining operations in mid-1997. In September of 1997, Customs investigated Heartland's operations in response to information from an industry source that Heartland might be importing sugar syrup in an attempt to avoid the TRQ. Customs could not substantiate the allegations; it therefore closed its investigation in October of 1997 without taking any action against Heartland.

III.

On January 14, 1998, the United States Cane Sugar Refiners' Association, the United States Beet Sugar Association, and their member companies (collectively, the "Associations") filed a petition under 19 U.S.C. § 1516 and/or 19 U.S.C. § 1625, seeking reclassification of Heartland's sugar syrup under either 1702.90.20 HTSUS or 1702.90.58/54 HTSUS.[3] The Associations argued that the classification of Heartland's sugar syrup under 1702.90.40 HTSUS defeated the purpose of the 6% solids content provision of 1702.90.20 HTSUS. The Associations argued that the provision was adopted to ensure that sugar syrups containing less than 6% non-sugar solids would be subject to the TRQ because such syrups

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[3] Section 1516 permits an interested party to submit a petition to the Secretary of the Treasury setting forth the classification under which it believes imported merchandise should be classified. 19 U.S.C. § 1516(a) (1994). Section 1625 requires Customs to publish any proposed interpretative ruling or decision which would modify or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days, and to give interested parties at least 30 days to submit comments on the proposed ruling or decision. 19 U.S.C. § 1625(c) (1994). By invoking § 1625, the Associations were inviting Customs to independently review the classification of Heartland"s sugar syrup.

compete directly with sugar. The Associations argued that Heartland's sugar syrup should be classified under 1702.90.20 HTSUS because it is derived from sugar cane or sugar beets and contains less than six percent soluble non-sugar solids. Alternatively, the Associations argued that Heartland's sugar syrup should be classified under 1702.90.54/58 HTSUS, which encompasses certain "Blended syrups described in additional U.S. note 4 to chapter 17," because it meets the description in Additional U.S. note 4 of a syrup that contains "sugars derived from sugar cane or sugar beets, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported."

On June 9, 1999, Customs published notice of its intent to revoke the New York Ruling Letter and to reclassify Heartland's sugar syrup under 1702.90.10 HTSUS or 1702.90.20 HTSUS, depending on whether the quantitative limitations of the TRQ had been met. *Proposed Revocation of Ruling Letter & Treatment Relating to Tariff Classification of Certain Sugar Syrups*, 33 Cust. Bull. No. 22/23, at 52 (June 9, 1999). In the proposed ruling letter, Customs determined that "there are no commercial identities or commercial uses for the syrups as imported other than the extraction of the molasses after importation, and the subsequent use of the syrups in the same manner as other syrups classified in provisions of the tariff that are subject to [the TRQ]." *Id.* at 57. Customs reasoned that, as a matter of law, it could consider the product's uses when determining its proper classification. *Id.* Customs stated that "it was the intent of the Presidential Proclamations which established the quotas to include the sugar syrups in question [in the TRQ.]" *Id.* at 59. Customs determined that Heartland's sugar syrup would have been subject to a quota under the Tariff Schedules of the United States ("TSUS"), which were in effect prior to the adoption of the HTSUS, and that conversion to the HTSUS was not intended to change the applicability of the sugar quotas to products such as Heartland's sugar syrup, particularly where Heartland was subjecting its

product to "artificial processing ... to avoid the quota." *Id.* at 59-60. Customs also determined that the added molasses is a "foreign substance" relative to the sugar to which it is added and, therefore, should not be included when determining the soluble solids content of the sugar syrup under 1702.90.10 HTSUS and 1702.90.20 HTSUS. *Id.* at 60-61. In support of its determination, Customs stated that although molasses is derived from sugar cane or sugar beets, it is derived only as a by-product of the refining process. *Id.* at 61. Customs also noted that molasses is classified under a separate subheading from sugar syrups, 1703 HTSUS. *Id.*

During the comment period, Customs received numerous comments from members of domestic and foreign sugar industries in support of the reclassification of Heartland's sugar syrup. Customs also received comments opposing the reclassification. Many of the opposing comments were submitted by groups of trade associations, importers and exporters, who opposed Customs' decision to use § 1625(c) instead of § 1516 to revoke the New York Ruling Letter, who opposed Customs' decision to revoke an interpretative ruling without a compelling reason for doing so, and who opposed Customs' departure from the rule that importers may fashion their goods to take advantage of favorable duty provisions. Heartland also submitted comments opposing the reclassification of its sugar syrup. Heartland argued, *inter alia,* that the New York Ruling Letter was obtained pursuant to Customs' established procedures and should be upheld, that the New York Ruling Letter correctly classified Heartland's sugar syrup, that the proposed ruling impermissibly focused on the post-importation use of the syrup, that the syrup has well-recognized commercial uses, that neither the TSUS nor the purpose of the TRQ govern the proper classification of the sugar syrup, and that the added molasses is not a foreign substance that should be excluded from the soluble solids content calculation required for classification under 1702.90.10 HTSUS or 1702.90.20 HTSUS.

On September 8, 1999, Customs issued a final notice revoking the New York Ruling Letter and classifying Heartland's sugar

syrup under 1702.90.10/20 HTSUS, effective November 8, 1999. *Revocation of Ruling Letter & Treatment Relating to Tariff Classification of Certain Sugar Syrups,* 33 Cust. Bull. No. 35/36 , at 41 (Sept. 8, 1999) ("*Revocation of Ruling Letter*"). The revocation ruling addresses two legal issues raised by the comments submitted in response to the proposed revocation: Customs' authority to revoke the prior ruling under 19 U.S.C. § 1625 and Customs' authority to consider the commercial identity of imported merchandise when determining its classification. *Id.* at 42-45. With regard to the former issue, Customs emphasized its mandate to correctly administer the tariff laws of the United States, and its authority to take corrective action when it learns that merchandise is improperly classified. *Id.* at 43. Customs stated that the existence of a petition under § 1516 did not preclude it from acting under § 1625. *Id.* In discussing the latter issue, Customs determined that the addition of molasses to raw sugar by Heartland is not a "genuine step" in the manufacturing process, but instead amounts to a "disguise or artifice" intended to escape a higher rate of duty such as a quota or tariff rate." *Id.* at 44-45. Customs reasoned that, under such circumstances, it is permitted to inquire into the commercial identity of the imported merchandise. *Id.*

With regard to the foreign nature of the added molasses, Customs stated that the step of "mix[ing] molasses with sugar is not a refining process for raw sugar, and the addition of water to such a mixture does not create a "sugar syrup" derived from a refining process from sugar cane or sugar beet." *Id.* at 53. Customs concluded that molasses, with its impurities, is a foreign substance that must be excluded from the solids content calculation of 170290.10/20 HTSUS. *Id.* Customs determined that the non-sugar solids content – excluding the molasses – of Heartland's sugar syrup is less than 6%. *Id.* Therefore, Customs concluded, the syrup is properly classified under 1702.90.10/20 HTSUS. *Id.*

IV.

On September 20, 1999, Heartland filed a complaint in the Court of International Trade challenging the classification of its sugar syrup under 1702.90.10/20 HTSUS and seeking a preliminary injunction to prevent Customs from enforcing the revocation ruling. The court exercised its jurisdiction under 28 U.S.C. § 1581(h) (1994), which permits the court to hear challenges to the classification of goods prior to their importation if the party bringing the challenge demonstrates that it will suffer irreparable harm if judicial review is not obtained prior to importation. *Heartland*, 74 F. Supp. 2d at 1326, 1329-32. Pursuant to 28 U.S.C. § 2640(e) (1994), the court reviewed the revocation ruling under the standard of review of the Administrative Procedure Act, 5 U.S.C. § 706. *Id.* at 1329. Thus, it considered whether Customs' decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.*

The court held that the revocation ruling was "not in accordance with law" because Heartland's sugar syrup is properly classified under 1702.90.40 HTSUS. *Id.* at 1332. The court determined that the plain language of that subheading encompasses the sugar syrup, as the syrup was described in Heartland's request for an advance classification ruling. *Id.* The court rejected Customs' reasoning that the molasses is a foreign substance that should be excluded from the solids content calculation, finding that the record demonstrated that the molasses is made from cane or beet sugar and that the sugar, molasses, and syrup "all have the same chemical ingredients, including impurities that naturally occur in sugar." *Id.* at 1333-34. The court reasoned that because raw sugar itself contains molasses, combining raw sugar with additional molasses does not amount to an addition of a foreign substance. *Id.* at 1134. The court stated that Customs' conclusion to the contrary "was simply wrong." *Id.* The court also stated that "Customs' interpretation of 'foreign substances' to include anything that is itself 'derived from sugar cane or sugar beets' is unreasonable and an abuse of discretion." *Id.*

The court also rejected Customs' determination that the addition of molasses amounted to an artifice or disguise. *Id.* at 1335. The court noted that Heartland never falsified or concealed the identity of its sugar syrup, its method of manufacture, or its use. *Id.* at 1337. The court determined that evidence of record demonstrated a clear commercial purpose for the addition of molasses, citing testimony to the effect that molasses may be added to adjust the purity of the product during crystallization or to produce a final product of a particular polarity. *Id.* at 1335. The court also determined that the evidence of record indicated that Heartland's sugar syrup results from an intermediate stage of the refining process, citing testimony to the effect that "the process of combining granular raw sugar with molasses, adding water, and heating is common in sugar refining operations." *Id.* at 1338. The court noted that the only evidence indicating that adding molasses to sugar is not a legitimate commercial process relates to the addition of molasses to refined sugar, not the addition of molasses to raw sugar, as is done by Heartland. *Id.* The court therefore concluded that Customs' determination that Heartland had engaged in an artifice and disguise and its subsequent consideration of the post-importation use of the syrup was "an abuse of discretion and otherwise not in accordance with law." *Id.* at 1338-39.

The court therefore granted Heartland's motion, declared the revocation ruling unlawful, and ordered that the sugar syrup be classified under 1702.90.40 HTSUS. *Id.* at 1345. The United States and the United States Beet Sugar Association appeal the court's decision. We have jurisdiction over their appeal pursuant to 28 U.S.C. § 1295(a)(5) (1994).

DISCUSSION

I.

In reviewing a decision of the Court of International Trade, this court usually applies anew the statutory standard of review applied by that court to the agency's decision. *Inland Steel Indus. v. United States,* 188 F.3d 1349, 1359 (Fed. Cir. 1999). Pursuant

to 28 U.S.C. § 2640(e), the court applied the APA standard of review to Customs' classification of Heartland's sugar syrup, determining whether the revocation ruling was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Heartland*, 74 F. Supp. 2d at 1329 (quoting 5 U.S.C. § 706(2)(A)). Subsequent to the court's decision, however, the Supreme Court issued *United States v. Mead Corp.*, 533 U.S. 218 (2001), in which it held that Customs classification rulings may merit deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). We therefore will evaluate Customs' classification of Heartland's sugar syrup under the standards required by *Mead* and *Skidmore*, as discussed in more detail below.

Appellants argue that the court failed to give the revocation ruling the deference required by *Mead* and *Skidmore*. Specifically, Appellants contend that the court improperly substituted its own judgment for that of Customs instead of giving appropriate weight to Customs' findings. In response, Heartland argues that the revocation classification ruling is entitled to minimal deference under *Mead* and *Skidmore* because the reasoning behind the ruling is not persuasive, and because it unjustifiably revoked a prior classification ruling. Moreover, Heartland asserts that because there is no dispute over the nature of its sugar syrup, the correct classification of the syrup presents a question of law over which the court was entitled to exercise *de novo* review.

On the merits of the court's decision, Appellants raise two main arguments. First, they argue that Customs' finding that Heartland improperly engaged in an artifice or disguise designed to avoid the TRQ was not arbitrary and capricious and, therefore, should not have been disturbed by the court. Appellants assert that Customs was entitled to consider the commercial identity of Heartland's sugar syrup, and argue that the record supports Customs' findings that there is no commercial purpose for adding molasses to sugar and that the sugar syrup has no commercial identity. In response, Heartland argues that neither the pre-importation manufacturing process nor the processing that

Heartland performs in the United States involves any artifice or disguise. Heartland also argues that the cases cited by Customs do not support its finding of artifice or disguise, and that its sugar syrup indeed has a commercial use, although that use is irrelevant to the correct classification of the sugar syrup.

Appellants' other main argument is that the court erred when it determined that the molasses in Heartland's sugar syrup is not a "foreign substance" as that term is used in 1702.90.10/20 HTSUS. Appellants argue that Customs' interpretation of the term "foreign substances" is entitled to deference. Appellants assert that the plain language of the HTSUS provisions, the structure of 1702.90 HTSUS, and the legislative history of the HTSUS provisions support Customs' determination that the term "foreign substances" refers to substances that are foreign to the syrup at its current stage of manufacture, such as the molasses Heartland adds to raw sugar. In response, Heartland contends that Customs' determination that molasses, which is derived from sugar cane or sugar beets, is "foreign" to a sugar syrup that also is derived from sugar cane or sugar beets is absurd because the molasses and the sugar syrup have common ingredients. Heartland also contends that it is the physical constitution of the sugar syrup, not its method of manufacture, that must be the basis of classification under 1702.90 HTSUS.

Appellants also challenge the authority of the Court of International Trade to determine the correct classification of Heartland's sugar syrup. Appellants argue that because Heartland brought this action under 28 U.S.C. § 1581(h) and because the court was required by 28 U.S.C. § 2640(e) to apply the APA standard of review, the court only could vacate and remand Customs' decision; it could not itself classify the sugar syrup. Heartland responds to this argument by emphasizing the court's duty to determine the proper classification of imported merchandise, and by citing the court's authority under 28 U.S.C. § 2643(c)(4) (1994) to "order the appropriate declaratory relief" in any action brought under § 1581(h).

For the reasons that follow, we determine that Customs' interpretation of the term "foreign substances" in 1702.90.10/20 HTSUS as including the molasses which Heartland adds to its sugar syrup merits deference under *Skidmore* because of its persuasiveness. We therefore uphold the classification of the syrup under 1702.90.10/20 HTSUS. In view of that holding, we need not address the other arguments raised by the parties on appeal.

II.

The issue before the Supreme Court in *Mead* was "whether a tariff classification ruling by the United States Customs Service deserves judicial deference." *Mead,* 533 U.S. at ----, 121 S. Ct. at 2168. The Court determined that Customs "classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale." *Id.* at 2175 (quoting *Christensen v. Harris County,* 529 U.S. 576, 587 (2000)) (internal citation omitted). The Court continued,

> To agree ... that Customs ruling letters do not fall within *Chevron* is not ... to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate Skidmore's holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.

Id. (quoting *Skidmore,* 323 U.S. at 139-40) (internal citations omitted). Commenting on the highly detailed nature of the applicable regulatory scheme and Customs' specialized experience in classifying goods, the Court determined that "[a] classification ruling ... may ... at least seek respect proportional to its 'power to persuade.'" *Id.* at 2175-76 (quoting *Skidmore,* 323 U.S. at 140, and citing *Christensen,* 529 U.S. at 587; *id.* at 595 (Stevens, J.,

dissenting); *id.* at 596-97 (Breyer, J., dissenting)). The Court stated that "[s]uch a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* at 2176.

Although the classification ruling before the Court in *Mead* was not issued pursuant to 19 U.S.C. § 1625(c) and, therefore, was not subject to a public notice and comment procedure, we read the Court's holding as applying to all Customs classification rulings. *See id.* at 2175 ("The statutory changes [requiring a notice-and comment period when Customs modifies or revokes a prior classification ruling] reveal no new congressional objective of treating classification decisions generally as rulemaking with force of law, nor do they suggest any intent to create a *Chevron* patchwork of classification rulings, some with force of law, some without. In sum, classification rulings ... are beyond the *Chevron* pale."). We therefore will review the classification of Heartland's sugar syrup in accordance with *Mead* and *Skidmore*.

III.

Mead indicates that the following factors are to be evaluated when determining the degree of deference to accord a Customs classification ruling: "its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Mead*, 533 U.S. at ----, 121 S.Ct. at 2176. Those factors echo the factors set forth in *Skidmore* for determining the weight to accord an administrative ruling, interpretation, or opinion: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Applying these factors to the classification of Heartland's sugar syrup, we determine that the revocation ruling is entitled to deference because of its persuasiveness.

The revocation ruling was issued pursuant to a notice and comment process, during which numerous members of the sugar industry, including the United States Beet Sugar Association and Heartland, submitted comments in support of and in opposition to the ruling. Customs responded to the two main legal issues raised by the comments when it issued the ruling. *Revocation of Ruling Letter,* 33 Cust. Bull. No. 35/36 at 42-47. We therefore conclude that Customs gave thorough consideration to the ruling.

The revocation ruling is supported by a logical and well-reasoned explanation published in the Customs Bulletin. *Id.* at 42-54. Specifically, on the issue of whether the term "foreign substances" encompasses the molasses Heartland adds to raw sugar to make its sugar syrup, Customs explained:

> The addition of the molasses to the sugar is a foreign substance [sic] containing impurities in producing the sugar syrup and, therefore, we exclude the molasses with impurities in calculating the 6% rule....
> There is a view that since the molasses is naturally found in sugar cane or sugar beets, it meets the requirements of subheadings 1702.90.10/20 HTSUS, in that it (molasses) is derived also from sugar cane or sugar beets. As stated above, molasses is derived as a by-product from the refining of sugar cane or sugar beets and it is not derived as sugar from the refining of sugar cane or sugar beets. Thus, molasses syrups are classified in heading 1703, HTSUS, and not in heading 1702, HTSUS.

Id. at 53.

We also note that Customs has "specialized experience" in classifying goods, *Mead,* 533 U.S. at ----, 121 S. Ct. at 2175, which lends further persuasiveness to its ruling.

The only factor that weighs against giving deference to the revocation ruling is the ruling's lack of consistency with an earlier

pronouncement, the New York Ruling Letter. The revocation ruling, of course, changed the classification of Heartland's sugar syrup. However, because § 1625(c) permits Customs to revoke a prior classification of goods, inconsistency with a prior ruling is not itself a basis for denying all deference to a revocation ruling. Moreover, the New York Ruling Letter was not issued pursuant to a notice and comment process and did not address the specific issue addressed in the revocation ruling – whether the molasses Heartland adds to raw sugar is a foreign substance within the meaning of 1702.90.10/20 HTSUS.

Under these circumstances, we conclude that the revocation ruling has "power to persuade." *Mead*, 533 U.S. at ----, 121 S.Ct. at 2176; *Skidmore*, 323 U.S. at 140.

As discussed above, the relevant provision of the HTSUS does not indicate to what a substance must be "foreign" in order to be a "foreign substance" excluded from the solids content calculation of 1702.90.10/20 HTSUS. Customs therefore had to interpret the term "foreign substances" in order to classify Heartland's sugar syrup. Customs determined that the term refers to substances that are foreign to the sugar syrup at the relevant stage of the refining process. Customs concluded that, while molasses is a by-product of the sugar refining process, "[t]he mix[ing] of molasses with sugar is not a refining process for raw sugar." *Revocation of Ruling Letter*, 33 Cust. Bull. No. 35/36 at 53. Customs therefore determined that the molasses Heartland adds to raw sugar to make its sugar syrup is a foreign substance that must be excluded from the solids content calculation of 1702.90.10/20 HTSUS.

Giving the revocation ruling the deference it is due under *Mead* and *Skidmore*, we see no reason to disturb Customs' interpretation. The fact that molasses and raw sugar both are derived from sugar cane or sugar beets does not undermine Customs' interpretation. Nor do we believe that the fact that molasses and raw sugar both are "composed of the same chemical ingredients in varying proportions," *Heartland*, 74 F. Supp. 2d at

1334, or the fact that the raw sugar to which Heartland adds the molasses itself contains some molasses prevents molasses from being a foreign substance vis-a-vis raw sugar. When the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance.

The Court of International Trade went too far when it determined that, because 1702.90 HTSUS encompasses sugar syrups "'derived from sugar cane or sugar beets,'" any substance that also is "'derived from sugar cane or sugar beets' ... cannot be 'foreign' to HTSUS 1702.90." *Id.* at 1334-35 (quoting 1702.90 HTSUS). The explanatory notes cited by the court do not support its narrow construction. Explanatory Note 17.02(B)(3), which provides examples of sugar syrups that fall under 1702 HTSUS, states that "golden syrup" falls under 1702 HTSUS. The court noted that golden syrup is a table syrup made from molasses, and considered that the inclusion of golden syrup under 1702 HTSUS undermined Customs' determination that molasses is a "foreign substance" under 1702.90.10/20 HTSUS. *Id.* at 1332-33. However, the note's discussion of golden syrup does not shed light on the issue before us because the note addresses classification under heading 1702 in general, not classification under subheading 1702.90.10/20 specifically. Moreover, the note does not address a syrup made by combining raw sugar with molasses; instead, golden syrup is described in the note as being "'made from the syrup remaining during sugar refining after crystallization and separation of refined sugar, or from cane or beet sugar, by inverting part of the sucrose or by the addition of invert sugar.'" *Id.* at 1333 (quoting HTSUS Explanatory Note 17.02(B)(3)).

The court also cited Explanatory Note 17.02(B)(2), which states that "[j]uices and syrups obtained during the extraction of sugars from sugar beet, sugar cane, etc.," fall under 1702 HTSUS, and that these syrups "may contain pectin, albuminoidal substances, mineral salts, etc., as impurities." *Id.* at 1335. The

court determined that because this note permits products with the same impurities as molasses to be classified under 1702 HTSUS, it undermines Customs' determination that molasses is a foreign substance. *Id.* This note, however, does not indicate whether the molasses added to raw sugar to make Heartland's sugar syrup is a "foreign substance" under 1702.90.10/20 HTSUS because it does not set forth under which subdivision of 1702 HTSUS the described sugar syrups are classified. Moreover, the impurities described in the note are naturally present in the juices and sugar syrups, not added to raw sugar like the molasses at issue in this case.

Heartland does not argue that its sugar syrup contains less than 6% by weight of soluble non-sugar solids when the weight of the molasses solids is excluded. Therefore, in view of our determination that Customs' interpretation of the term "foreign substances" should not be disturbed, we uphold the revocation ruling classifying Heartland's sugar syrup under 1702.90.10/20 HTSUS.

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade declaring the revocation ruling unlawful and ordering that Heartland's sugar syrup be classified under 1702.90.40 HTSUS is

REVERSED

FRIEDMAN, *Senior Circuit Judge*, concurring:

I reach the same result the Court does – the judgment of the Court of International Trade is reversed – but get there by a different route.

The syrup Heartland imported from Canada had molasses added to it before importation. Upon receiving the syrup in the United States, Heartland first removed the molasses and then

refined the remaining syrup. The removed molasses was returned to Canada but was again used the same way by adding it to other sugar syrup. As far as appears, this chain continued indefinitely.

Heartland makes no claim that the presence of the molasses in the sugar during the syrup's journey from Canada to the United States in any way aided, improved or facilitated the refining of the sugar syrup after the molasses had been removed. It does not state, or even suggest, that if the sugar syrup it had imported had not contained the molasses, it would temporarily have added molasses in the United States and then removed it prior to processing.

Since the addition and removal of the molasses from the sugar served no manufacturing or commercial purpose, the conclusion is irresistible that the only purpose of this strange arrangement was to create a fictitious product that, because of the temporary presence of the molasses, qualified for the lower rate of duty on sugar imports containing specified amounts of non-sugar solids.

Almost ninety years ago, the Supreme Court, speaking through then Justice Hughes, pointed out that although "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported[,] [t]his, of course, does not mean that a prescribed rate of duty can be escaped by resort to disguise or artifice." *United States v. Citroen,* 223 U.S. 407, 414-15 (1912) (internal quotation marks and citations omitted). The Court further recognized that "when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate." *Id.* at 415.

In revoking the New York Ruling Letter, Customs stated that "the importer has engaged in a process which is not a genuine step in manufacturing or production of an article." 33 Cust. B. & Dec. 41, 44 (1999). It concluded that "the processing in this case is not

legitimate tariff engineering. But rather, it is merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate." 33 Cust. B. & Dec. at 45. As Customs explained:

> Sugar and molasses are mixed in Canada. Water is then added to the mixture to make a sugar syrup. Subheading 1702.90.10, HTSUS, provides for sugar syrups derived from cane or sugar beets, containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, subject to tariff rate quotas. The molasses with its impurities added to the sugar is sufficient to assure that the syrup exceeds the 6 percent limitation so that the syrup is classified in a provision not subject to quota. If the syrup was further used in its condition as imported, in the next step in producing an article of commerce, this may satisfy the tariff engineering concept. However, after importation, the molasses is removed and the sugar is used in the same manner as sugar subject to quota. In its condition as imported, we conclude that there is no commercial use for the syrup as imported....
>
> The recipient of the ruling claims that "[i]n the production of sugar products, both liquid and granular, molasses is frequently used as an ingredient to achieve desired polarities." However, the molasses is added to the sugar in this case to achieve a desired level of soluble non-sugar solids for the avoidance of quota. After importation, the molasses is removed. According to comments from a domestic sugar refiner, it makes no financial sense, absent a desire to avoid the sugar tariff, for a conventional sugar operation to either enrich a liquid (syrup or molasses) stream with sugar or to add molasses to such a stream. Sugar operations separate sugar from the liquid or molasses phase, they do not separate the sugar and then introduce molasses to the sugar, effectively nullifying the refining operation. Consequently, Customs has

> concluded that this operation is not legitimate tariff engineering.

33 Cust. B. & Dec. at 44-45.

The record supports Customs' foregoing factual statements, and they fully justify its legal conclusion that Moreland's importation of the sugar syrup with molasses "is merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate." Customs, therefore, was fully justified in revoking the New York Ruling Letter that applied the lower tariff rate based upon such "disguise or artifice." *See* 19 U.S.C. § 1625(c) (prescribing procedures for Customs to modify or revoke a "prior interpretive ruling").

Of course, Heartland built its business in reliance upon the New York Ruling Letter that its imported sugar syrup was entitled to the lower duty. In obtaining that ruling, however, Heartland did not disclose to Customs the true and precise nature of the practice it proposed to follow with regard to the imported syrup. It merely described the composition of the import. If Heartland had fully informed Customs of how it intended to deal with the imported sugar syrup, we now know that Customs would not have ruled the import was subject to the lower duty.

In sum, whatever financial or other problems Heartland now faces because of the revocation of the New York Ruling Letter are the result of its own actions, for which it must bear full responsibility.

APPENDIX B

In the
United States Court of Appeals
for the Federal Circuit

NOS. 00-1287, 00-1289 [FILED Dec. 4, 2001]

HEARTLAND BY-PRODUCTS, INC., *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

and

UNITED STATES BEET SUGAR ASSOCIATION, *Defendant-Appellee.*

Appeal from the United States Court of International Trade.

No. 99-09-00590

Judith M. Barzilay, *Judge*

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and responses* having been referred to the circuit judges who are in regular active service,

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*Responses were filed by the United States, and the U.S. Beet Sugar Association.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 11, 2001.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: December 4, 2001

APPENDIX C

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

[Filed Oct. 19, 1999]

HEARTLAND BY-PRODUCTS, INC., *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant,* and UNITED STATES BEET SUGAR ASSOCIATION, *Defendant-Intervenor.*	No. 99-09-00590 Judith M. Barzilay, *Judge*

OPINION

BARZILAY, Judge.

I. INTRODUCTION

This matter is before the court pursuant to Plaintiff's Motion for a Preliminary Injunction or in the alternative, for Judgment Upon an Agency Record pursuant to USCIT R. 56.1.[1] Plaintiff

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[1] On September 22, 1999, the Court heard oral argument on an Order to Show Cause why an expedited briefing schedule on Plaintiff's Motion for a Preliminary Injunction should not issue. Following negotiations, the parties agreed to deem Plaintiff's Motion for a Preliminary Injunction as one for Judgment Upon an Agency Record as well ("*Pl.'s Br.*"). Pursuant to the parties' agreement, on September 24, the court entered an extremely

seeks pre-importation review of a ruling issued by the United States Customs Service ("Customs") revoking a prior classification ruling issued to Plaintiff. *See Revocation of Ruling Letter and Treatment Relating to Tariff Classification of Certain Sugar Syrups,* 33 Cust. Bull. No. 35/36 at 41 (Sept. 8, 1999) ("Final Notice"). The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(h) (1994).[2]

II. BACKGROUND

Plaintiff, a sugar refiner, imports sugar syrup from Canada and refines the syrup into liquid sucrose. The sugar syrup is derived from sugar cane and sugar beets and contains more than six percent soluble non-sugar solids. Before undertaking business operations, Plaintiff sought an advance ruling from Customs pursuant to the provisions of 19 C.F.R. § 177 (1995).[3] On May 15,

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expedited briefing schedule which was designed to allow a final determination on the merits by October 15. On October 14, 1999, the Court heard oral argument on the merits and issued a ruling from the bench following the hearing. This opinion further explains the reasons for the decision.

[2] Plaintiff moved to strike the Declaration of David Williams, *Def.'s Mot. To Dismiss and Mem. in Supp. of the United States' Resp. in Opp'n to Pl.'s Mot. For J. on the Agency R., and/or in the Alternative, Mot. For Prelim. Inj., and in Support of the United States' Mot. To Dismiss the Action* at Attachment 1 ("*Def.'s Br.*"), and the Declaration of Jeffrey Robinson, *Def.-Intervenor's Mem. in Supp. of its Mot. To Dismiss and in Opp'n to Pl.'s Mot. For a Prelim. Inj and to Pl.'s Mot. For J. on the Agency R.* at Annex 24 ("*Def.-Intervenor's Br.*"), since they were not part of the agency record. To the extent the Court considers these submissions it does so narrowly and not as support or explanation for the agency's decision. Accordingly, Plaintiff's motion is denied. Plaintiff has also requested attorney's fees, expenses and court costs under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994). The Court finds this request premature at the present time, *see* 28 U.S.C. § 2412(d)(1)(B), and thus does not address it.

[3] The general provision, 19 C.F.R. 177.1, provides:

> It is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those

1995, Customs issued New York Ruling Letter ("NYRL") 810328 classifying the merchandise under subheading 1702.90.40 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1995)[4], with a .7 cents per liter general rate of duty and a .2 cents

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> laws fully understand the consequences of that transaction prior to its consummation. For this reason, the Customs Service will give full and careful consideration to written requests from importers and other interested parties for rulings or information setting forth, with respect to a specifically described transaction, a definitive interpretation of applicable law, or other appropriate information. Generally, a ruling may be requested under the provisions of this part only with respect to prospective transactions--that is, transactions which are not already pending before a Customs Service office by reason of arrival, entry, or otherwise.

Id. A ruling letter is defined as "a ruling issued in response to a written request therefor and set forth in a letter addressed to the person making the request or his designee." *Id.* at 177.1(d)(1).

The person requesting the ruling is to submit the request in the form of a letter. *See* 19 C.F.R. 177.2(a). Letters requesting classification must comport with the provisions of 19 C.F.R. 177.2(b)(2)(ii), which in relevant part state:

> If the transaction involves the importation of an article for which a ruling as to its proper classification under the provisions of the Harmonized Tariff Schedule of the United States is requested, the request for a ruling should include a full and complete description of the article and whenever germane to the proper classification of the article, information as to the article's chief use in the United States, its commercial, common, or technical designation, and, where the article is composed of two or more materials, the relative quantity (by weight and by volume) and value of each.

Id.

[4] The provisions of the HTSUS at issue are as follows:

General Rules of Interpretation

Classification of goods in the tariff schedule shall be governed by the following principles:

1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of

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the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions[.]

* * * *

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Chapter 17

Additional U.S. Notes

* * * *

5. [T]he aggregate quantity of sugars, syrups and molasses entered, or withdrawn from warehouse for consumption ... during any fiscal year, shall not exceed in the aggregate an amount (expressed in terms of raw value), not less that 22,000 metric tons, as shall be established by the Secretary [of Agriculture].

Heading/Subheading/Article Description

1702
Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel:

* * * *

1702.90 Other, including invert sugar:
Derived from sugar cane or sugar beets:
Containing soluble non-sugar solids(excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids:

* * * *

1702.90.10 Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions

1702.90.20 Other[1]

per liter special rate of duty if the goods qualify as North American Free Trade Agreement ("NAFTA") originating goods. Administrative Record File I, Doc. 3 ("AR I(3)").

Plaintiff began its refining operations in the middle of 1997. The process Plaintiff uses to refine the sugar syrup into liquid sucrose, while proprietary, may be described in general terms. Before arriving in the United States, the sugar syrup is manufactured according to Heartland's specifications. The process involves adding raw granular sugar, dry form sucrose, to molasses. Water is added and the material is then heated and agitated dissolving the dry form sucrose and forming a definable, homogeneous sugar syrup. *See* AR I(26) at 3. After being transported to the plant in Taylor, Michigan, the syrup is pumped into storage tanks and the following steps occur. First, the syrup is placed in a vacuum pan to induce the crystallization of sucrose. Next, the massecuite, a slurry of crystals and syrup, is subjected to centrifugal force to separate the crystals from the syrup. Finally the crystals are subjected to a number of steps making them suitable to sell as liquid sucrose for use in the production of cereal, ice cream, candy and other food applications. The sucrose content of the

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* * * *

1702.90.40	Other

* * * *

[1] See subheadings 9904.17.08-9904.17.16.

* * * *

9904.17.08	Sugars, syrups and molasses, provided for in subheadin[g] 1702.90.20: If entered during the effective period of safeguards based upon value:
	* * * *
9904.17.16	If entered during the effective period of safeguards based upon quantity announced by the Secretary of Agriculture

liquid sucrose is several percentage points higher than the syrup in its condition as imported. Some of the residue, which is molasses, is sold for use in animal feed, some is lost in the process and some is returned to Canada.

On January 14, 1998, Defendant-Intervenor, United States Beet Sugar Association, filed a petition with Customs under 19 U.S.C. § 1516, suggesting alternatively that Customs had the option to proceed under 19 U.S.C. § 1625, seeking reclassification of the sugar syrup.[5] AR I(1). Customs chose the latter option, and on June 9, 1999, issued notice of its intent to revoke NYRL 810328 and invited comments pursuant to 19 U.S.C. § 1625(c)(1) on proposed Headquarter Ruling ("HQ") 961273. *See Proposed Revocation of Ruling Letter and Treatment Relating to Tariff Classification of Certain Sugar Syrups,* 33 Cust. Bull. No. 22/23 at 52 ("Preliminary Notice"). Because of this procedural mechanism, Plaintiff was forced to obtain Defendant-Intervenor's submission through a Freedom of Information Act request. Following an extension of the comment period to August 9, 1999, on September 8, 1999, Customs published a notice of revocation, which pursuant

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[5] Section 1516 provides that an interested party may inquire into, among other things, the classification of imported merchandise and file a petition setting forth the rate of duty it believes proper. *See* 19 U.S.C. § 1516(a). If the Secretary of the Treasury determines the classification is incorrect, the statute directs him to determine the correct classification. *See id.* at § 1516(b). If the Secretary determines the classification is correct he is directed to notify the petitioner who then has thirty days to contest the decision. *See id.* at § 1516(c). Upon receipt of such notice, the Secretary must publish his determination and the petitioner's desire to contest it, and furnish the petitioner with sufficient information to enable a challenge to the liquidation of one entry. *See id.* No time limits are imposed on the Secretary to make his initial decision.

Section 1625 provides at least a thirty day comment period for modification or revocation of a prior interpretive ruling or decision in effect for at least sixty days. *See* 19 U.S.C. § 1625(c)(1). Once the comment period closes, the Secretary is directed to publish a final ruling within thirty days. *See id.* Sixty days following publication of the final ruling or decision it becomes effective. *See id.*

to 19 U.S.C. § 1625 makes HQ 961273 effective on November 8, 1999, sixty days following publication. *See* Final Notice at 41. Plaintiff then sought relief in this court as previously described.[6]

III. STANDARD OF REVIEW

28 U.S.C. § 2640(e) (1994) provides that "[i]n any civil action not specified in this section, the [court] shall review the matter as provided in [5 U.S.C. § 706]." (28 U.S.C. § 1581(h) is not specified therein). *Id.* 5 U.S.C. § 706(2)(A) provides, in relevant part, that "the reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions of law found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* The scope of review is limited to the administrative record. *See* 28 U.S.C. § 2640(e); 5 U.S.C. § 706.

IV. DISCUSSION

A. Plaintiff Has Met Its Burden of Demonstrating by Clear and Convincing Evidence That the Court Has Jurisdiction Pursuant to 28 U.S.C. § 1581(h).

Plaintiff asserts that the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(h) with respect to declaratory relief and § 1581(i) with respect to injunctive relief. Defendant concedes jurisdiction with respect to § 1581(h) but challenges jurisdiction

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[6] In its complaint, Plaintiff included a count alleging that Customs abused its discretion by permitting political considerations to dictate the reclassification. As emphasized at oral argument held October 14, 1999, the Court views this case as one dealing solely with the proper classification of Plaintiff's imported product. Therefore, none of the allegations, on both sides, of improper political activity entered into the Court's deliberations or decision. In addition, because the Court holds for Plaintiff on the classification issue, it need not, and does not, consider two of Plaintiff's other claims: Count III, that Customs violated the law by proceeding under 19 U.S.C. § 1625 rather than under 19 U.S.C. § 1516; Count V, that Customs violated the law by failing to demonstrate a compelling reason for its revocation.

under § 1581(i). Defendant-Intervenor contests jurisdiction under both § 1581(h) and (i), and argues that the Court may only exercise jurisdiction pursuant to § 1581(a). Because of the differing positions of each party in this case, the Court finds it necessary to address the issue of jurisdiction in detail. The Court exercises jurisdiction under § 1581(h), and will grant relief accordingly, thus the need for a preliminary injunction is moot.

Section 1581(h), Title 28, United States Code, provides:

> The [court] shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, ... or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h) (1994). The Court of Appeals for the Federal Circuit outlined four requirements for invoking the jurisdiction of this Court under 28 U.S.C. § 1581(h):

> (1) judicial review must be sought prior to importation of goods;
> (2) review must be sought of a ruling, a refusal to issue a ruling or a refusal to change such ruling;
> (3) the ruling must relate to certain subject matter; and
> (4) irreparable harm must be shown unless judicial review is obtained prior to importation.

American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1551-52 (Fed. Cir. 1983), *cert. denied,* 466 U.S. 937 (1984).

Defendant does not claim that the Court lacks jurisdiction under § 1581(h). Between the other parties to this action, there is no dispute as to the first three requirements of jurisdiction under this section. Defendant-Intervenor challenges only Heartland's claim of irreparable injury. "When a jurisdictional issue is raised, the burden rests on the plaintiff to prove that jurisdiction exists." *Manufacture De Machines Du Haut-Rhin v. Von Raab,* 6 CIT 60, 62, 569 F. Supp. 877, 880 (1983) (citing *United States v. Biehl & Co.,* 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982)). Plaintiff must demonstrate irreparable harm by a clear and convincing evidence standard.[7]

Irreparable harm is that which "cannot receive reasonable redress in a court of law." *Manufacture De Machines Du Haut-Rhin,* 6 CIT at 64, 569 F. Supp. at 881-82 (quoting BLACK'S LAW DICTIONARY 706-707 (5th ed. 1979)). "In making this determination, what is critical is not the magnitude of the injury, but rather its immediacy and the inadequacy of future corrective relief." *National Juice Products v. United States,* 10 CIT 48, 53, 628 F. Supp. 978, 984 (1986) (citations omitted). To fulfill its burden, Plaintiff must "set forth sufficient documentation to support its allegations in establishing the threat of irreparable harm." *Thyssen Steel Co., Southwestern Division of Thyssen, Inc. v. United States,* 13 CIT 323, 326, 712 F. Supp. 202, 204 (1989) (citing *718 Fifth Avenue Corp. v. United States,* 7 CIT 195, 198 (1984)).

Plaintiff asserts that implementation of the revocation of NYRL 810328 will destroy its business. *Compl.* ¶ 9 (citing Affidavit of Gregory Kozak ("Kozak Aff.")). Plaintiff claims that the reclassification of Heartland's sugar syrup as per HQ 961273 will subject the sugar syrup to a prohibitive tariff-rate quota

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[7] 28 U.S.C. § 2639(b) provides: "In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence."

("TRQ"), thereby preventing Heartland from importing the product and effectively forcing it to close its doors. *Id.*

Plaintiff has provided sufficient documentation to clearly and convincingly establish jurisdiction under § 1581(h). Attached to its brief is the affidavit of the President of Heartland, Gregory Kozak, detailing the extent of business disruption that Heartland will suffer if it is unsuccessful in its legal challenge. The proposed increase in duties of 7000 percent, which will result from the revocation of NYRL 810328, will raise Heartland's costs, and force Heartland's three main customers to arrange long-term commitments with other suppliers. Kozak Aff. ¶ 13-16.[8] Heartland will additionally have to abandon its transport and supply arrangements. *Id.* ¶ 20. The company will thereby be forced to lay off all of its sixty employees trained to work in the Taylor, Michigan plant, and completely cease production. *Id.* ¶ 17, 21-23.

The fatal blow that reclassification will deal to Heartland certainly suffices as "irreparable injury." Not only will failure to obtain review prior to importation sound the death knell for Heartland's business, but the injury will, as evidenced by the aforementioned documentation, occur immediately. Future corrective relief will be inadequate, as even if Heartland prevails on the classification ruling, its main customers will have made long-term supply arrangements with other sugar producers.

Precedent indicates that irreparable harm may be sufficiently shown in instances where the harm is less drastic than a total shutdown. As this court in *National Juice* stated, "severe disruption of business operations can constitute irreparable injury under certain circumstances." 10 CIT at 54, 628 F. Supp. at 984. In *National Juice,* this court held that the plaintiffs had

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[8] Heartland has supplied the Court with documentation of the loss of its customers in the form of letters from its customers indicating their plans to take their business elsewhere if the original classification is not restored. *See Pl.'s Br.* at Confidential Annex 6-8.

demonstrated irreparable harm by showing that they would be "unable to use foreign manufacturing concentrate and ... [unable] to satisfy all of their customer's [sic] orders for retail orange juice products." *Id.* Additionally, in *American Frozen Food Institute, Inc. v. United States,* this court held irreparable injury to be established when "[p]laintiffs have presented evidence that they will lose substantial sums of money from the destruction of stockpiled non-complying labelling." 18 CIT 565, 570, 855 F. Supp. 388, 393 (1994). Neither of the plaintiffs in either case established evidence of total business destruction and yet this court held irreparable injury to be sufficiently established. As Plaintiff in this case has shown documented evidence that its doors will be forced to close barring revocation of the reclassification, the Court holds that Plaintiff has more than met its burden of providing evidence of irreparable harm, and therefore jurisdiction under § 1581(h) is proper.

Defendant-Intervenor argues that Heartland has not "made such a 'clear showing' that its case falls within the 'limited circumstances' of Section 1581(h)." *Def.-Intervenor's Br.* at 11 (citations omitted). It asserts that because Heartland "does not claim that it would be placed in bankruptcy or that it would suffer irreparable reputational harm ... [its] claims of irreparable harm are hollow at best and misleading at worst." *Id.* at 12-13. Yet Plaintiff "may, but need not, demonstrate that it would suffer multiple forms of irreparable harm." *CPC International, Inc. v. United States,* 19 CIT 978, 980, 896 F. Supp. 1240, 1243 (1995). Defendant-Intervenor may therefore not successfully disprove this court's jurisdiction under § 1581(h) merely by reciting other forms of irreparable harm which Plaintiff has *not* stated in support of its claim.

Defendant-Intervenor's only challenge to the reason Plaintiff has given the Court as a basis for jurisdiction is the mere assertion that its parent corporation, E.D. & F. Man Group can absorb the increased costs that Heartland will suffer if the sugar syrup is not reclassified. *Id.* at 12- 13. This argument is meritless for several

reasons. First, Heartland's parent company is not a party to this case, and Defendant-Intervenor cannot successfully challenge a party's showing of irreparable harm by making assertions based on the potential financial abilities of a nonparty. The Court agrees with Plaintiff that asking the Court to hold a nonparty parent company responsible for the losses of a subsidiary party to the case is essentially asking the Court to pierce the corporate veil. *Pl.'s Reply Mem. of Points and Authorities in Supp. of Pl.'s Mots. For J. on the Agency R. and for a Prelim. Inj.* at 46 ("*Pl.'s Reply*"). The Court is well aware of the general rule that the corporate entity should be recognized absent specific exceptional circumstances. As the Federal Circuit stated, "the corporate form is not to be lightly cast aside." *3D Systems, Inc. v. Aarotech Laboratories, Inc.*, 160 F.3d 1373, 1380 (Fed. Cir. 1998) (citing *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 552 (Fed. Cir. 1990)). Defendant-Intervenor has provided no evidence nor does the record reflect exceptional circumstances or reasons why the corporate veil should be pierced in this case.

Second, even if the Court were in a position to pierce the corporate veil and hold the corporation responsible for the potential costs to Heartland, Defendant-Intervenor has provided no documentation that Heartland's parent company could prevent the harm Heartland claims to suffer. Defendant- Intervenor speculates that E.D. & F. Man Group can absorb the increased costs to Heartland; such speculation simply does not refute Plaintiff's sworn and signed documentary evidence establishing jurisdiction under § 1581(h). Thus, it is the Court's determination that jurisdiction is properly exercised under § 1581(h).

B. Plaintiff's Product Is Properly Classified under the Plain Meaning of Subheading 1702.90.40 HTSUS. Therefore, Customs' Proposed Revocation Is Not in Accordance with Law.

Heartland's imported sugar syrup is properly classified in HTSUS 1702.90.40. The plain language of the tariff provision describes the imported product. HTSUS 1702.90.40 covers sugar

syrups not containing added flavoring or coloring matter ... containing soluble non-sugar solids greater than 6 percent by weight of the total soluble solids. Using the classic and long-standing principles of tariff classification which start with the application of the General Rules of Interpretation ("GRI") in the order in which they appear and following through with case law developed by the Supreme Court, courts of appeal, this court and its predecessor courts, there can be little doubt that the correct classification of Heartland's syrup is within HTSUS 1702.90.40.

As described to Customs in Heartland's ruling request dated April 18, 1995, Plaintiff's product is a sugar syrup whose components are sugar, water and soluble non-sugar solids. The syrup is exclusively of sugar beet and/or cane sugar origin, approximately 70 percent by weight of dissolved solids and approximately 30 percent by weight of water. The production process includes the combining of granular raw sugar[9] with molasses, of cane or beet origin, to produce a brown sugar of approximately 93 percent polarity. This sugar is then dissolved in hot water to produce a simple syrup. AR I(37-38).

GRI 1 requires that the classification process begin with the terms of the headings and section and chapter notes. Included within Heading 1702 is "sugar syrups not containing added flavoring or coloring matter." Plaintiff's product is a sugar syrup "whose components are sugar, water and soluble non-sugar solids." AR I(37).

Although the term "syrup" is not specifically defined in the Harmonized Tariff itself, there is no doubt as to its meaning and that Plaintiff's product falls within it. According to the Concise

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[9] Petitioners and Defendant-Intervenor here have described the product as refined beet or cane sugar, water and molasses. *See* AR I(1) at 1. However, there is no other record support for this statement and Defendant-Intervenor admitted at oral argument that plaintiff's description of its product is not controverted.

Oxford Dictionary, syrup is "water (nearly) saturated with sugar" or "condensed sugar cane juice, part of this remaining uncrystallized at various stages of refining." (7th ed. 1987). The Explanatory Notes[10] to heading 1702 also define and explain the term sugar syrup in note 1702(B) as follows:

> (1) **Simple syrups** obtained by dissolving sugars of this Chapter in water.
> (2) **Juices and syrups** obtained during the extraction of sugars from sugar beet, sugar cane, etc. These may contain pectin, albuminoidal substances, mineral salts, etc., as impurities.
> (3) **Golden syrup**, a table or culinary syrup containing sucrose and invert sugar. Golden syrup is made from the syrup remaining during sugar refining after crystallization and separation of refined sugar, or from cane or beet sugar, by inverting part of the sucrose or by the addition of invert sugar.

Special note should be taken of number (3) above, "Golden Syrup," as Customs has attempted to change the classification on the grounds that molasses is a foreign substance within the meaning of the words "excluding any foreign substances that may have been added" (item 1702.90) when counting what soluble solids should be counted toward the 6 percent by weight. As number (3) above makes clear, Golden Syrup is a recognized table syrup made from molasses ("the syrup remaining during sugar refining after crystallization and separation of refined sugar") or from cane or beet sugar.

In addition, the record demonstrates that the commercial meaning of the term sugar syrup includes Heartland's product. *See* AR V(17) Statement of James C.P. Chen; Statement of Jean-Pierre M. Monclin; Statement of Michael B. Inkson; and Statement of

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[10] The Explanatory Notes to the HTS have often been used to interpret HTS Subheadings. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998) (citing *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995)).

Roger J. Crain. When a tariff term is not defined, commercial meaning prevails. *Lynteq, Inc. v. United States,* 976 F.2d 693, 697 (Fed. Cir. 1992). Therefore, clearly Heartland's product is syrup within the meaning of heading 1702.

Plaintiff's syrup does not contain any added flavoring or coloring matter. The record reflects that this issue was discussed at a meeting held July 29, 1998 with Plaintiff's representatives and certain Treasury officials which resulted in a letter dated August 26, 1998 from Plaintiff's counsel explaining in great detail that the molasses added to the raw sugar in Plaintiff's processing cannot be considered added flavoring or coloring within the terms of the tariff. *See* AR II(1) at 1-4.[11]

Continuing to apply GRI 1 and 6[12] to the syrup leads to item 1702.90.40 because it is derived from sugar cane or sugar beet (1702.90) and has more than 6 percent soluble non-sugar solids (equal to or less than 6 percent would lead to 1702.90.10 or .20) and is not invert molasses (which would lead to 1702.90.35).

Factually, there is no doubt that Heartland's product contains more than 6 percent "soluble non-sugar solids." A test conducted by the Customs laboratory pursuant to an investigation, *see* AR I(6)(i), found the syrup more than 6 percent by weight of soluble non-sugar solids. Therefore, plaintiff's product fits the descriptive language of subheading 1702.90.40 and pursuant to its plain language is properly classified within it.[13]

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[11] Customs and Defendant-Intervenor do not pursue this issue in the case at bar.

[12] The application of GRI 6 requires comparison of co-equal subheadings and classification according to notes relating to such subheadings. There are no relevant subheading notes to consider in this case.

[13] The provision uniquely and accurately describes Heartland's product and is clearly an *eo nomine* provision. *See* 2 CUSTOMS LAW AND ADMINISTRATION § 53.3 (3d ed. 1999) and cases collected therein. Customs

Both Customs and Defendant-Intervenor argue, albeit on different grounds, that the molasses is a foreign substance in relation to the syrup under the terms of 1702.90 HTSUS "containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product)." If so considered, the soluble non-sugar solids in the molasses would be disregarded in determining the percentage of such solids in the syrup itself bringing the percentage to less than 6 percent thus preventing classification in subheading 1702.90.40.

As Plaintiff completely and lucidly explained in its brief, there is no factual nor legal support for Customs' conclusions that molasses should be considered a foreign substance for purposes of classification of the sugar syrup. As a matter of fact and, as Plaintiff's experts confirmed, the molasses used in the production of Plaintiff's syrup is made from cane or beet as is the granular sugar. The sugar, the molasses and the resulting syrup all have the same chemical ingredients, including impurities that occur naturally in sugar.

Customs was simply wrong to conclude, as it did in its revocation ruling:

> We believe that molasses with its impurities is a foreign substance and excluded in determining the 6% rule of subheading 1702.90.1000, HTSUS.... The addition of the molasses to the sugar is a foreign substance containing impurities in producing the sugar syrup and, therefore, we exclude the molasses with impurities in calculating the 6% rule.

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does not argue that the provision is a use provision, but does contend that use should be considered when classifying Plaintiff's syrup because the importation is an artifice. *Def.'s Br.* at p. 42. The Court does not agree. *See* discussion, *infra.*

Final Notice at 53. There is ample record evidence contradicting this conclusion. *See e.g.,* AR V(17) Statement of James C.P. Chen at ¶ 4-6; Statement of Jean-Pierre M. Monclin at ¶ 7-8; Statement of Michael B. Inkson at ¶ 8-12; Statement of Roger J. Crain at ¶ 6.

Defendant-Intervenor argues that molasses is foreign with regard to the sucrose that remains when molasses is removed from raw sugar during the refining process. *Def.-Intervenor's Br.* at 49. But Defendant-Intervenor misunderstood the basic process engaged in by Plaintiff to create its imported syrup. As it is raw sugar, which itself contains molasses, that is combined with additional molasses to create Heartland's syrup, the molasses cannot be considered foreign.

As Plaintiff correctly points out, its syrup, molasses and raw sugar are all composed of the same chemical ingredients in varying proportions. *Pl.'s Reply* at 16; *see also* AR V(17) Statement of James C.P. Chen; Statement of Michael B. Inkson (sugar experts stating that molasses cannot be said to be a foreign substance in relation to sugar). Therefore, neither substance can be considered foreign in relation to the other. Defendant-Intervenor also contends that molasses must be considered a foreign substance for purposes of this classification exercise or other portions of the sugar cane product could be included to make up the 6 percent solids. However, Defendant-Intervenor ignores the modifier "soluble." Cane leaves and bagasse would never fit the description "soluble non-sugar solids" and, therefore, cannot be compared to molasses when determining which non-sugar solids should be considered foreign substances.

The foreign substances argument is also not in accordance with law. It cannot be reconciled with the language of HTSUS or the Explanatory Notes. The word "foreign" appears in subheading 1702.90 modifying sugar syrups derived from sugar cane or sugar beets.

> Containing soluble non-sugar solids (excluding any *foreign substances* that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids.

There is ample record evidence that Customs' interpretation of "foreign substances" to include anything that is itself "derived from sugar cane or sugar beets" is unreasonable and an abuse of discretion.

In the revocation, Customs stated "molasses is not sugar derived from the refining of sugar cane or beets" and that the "mixture of molasses with sugar is not a refining process for raw sugar, and the addition of water to such a mixture does not create a 'sugar syrup' derived from a refining process from sugar cane or sugar beet." Final Notice at 52-53. However, Customs *sua sponte* added the word "refining." HTSUS 1702.90 refers simply to "derived from sugar cane or sugar beets." Thus, so long as a sugar or a syrup is "derived from sugar cane or sugar beets," it fall within HTSUS 1702.90. By the same token, so long as a "substance" is "derived from sugar cane or sugar beets," as the molasses used in Heartland's sugar syrup surely is, it cannot be "foreign" to HTSUS 1702.90.

The ENs for heading 1702 further refute Customs' position that molasses is "foreign." One of EN 1702(B)'s illustrations of sugar syrups covered by heading 1702 is described as follows:

> 2. **Juices and syrups** obtained during the extraction of sugars from sugar beet, sugar cane, etc. These may contain pectin, albuminoidal substances, mineral salts, etc., as impurities.

EN 1702(B) (emphasis in original). By expressly including within heading 1702 a syrup containing "pectin, albuminoidal substances, mineral salts, etc., as impurities," the EN directly contradicts

Customs' position that such impurities in molasses render molasses a substance "foreign" to sugar syrup.[14]

Customs also argues that the molasses must be considered foreign because "[i]f something is added or developed in the product that artificially increases the soluble non-sugar solids, that addition is a 'foreign substance' for purposes of subheading 1702.90." *Def.'s Br.* at 51. This argument is based on a misunderstanding of Plaintiff's pre-importation process and the case law dealing with artifice or deceit. Record evidence shows a clear commercial purpose for combining molasses with raw sugar in the refining process. *See* AR V(17) Statement of Jean-Pierre M. Monclin at ¶ 6 ("In sugar processing such mixing of molasses with granular sugar is common practice... it is the principal way to adjust stream purity during crystallization."); Statement of Michael B. Inkson at ¶ 13 ("[M]ixing molasses with higher purity streams [granular or liquid] is quite common in the production of sugar products. The process is designed to produce final sugar products of particular polarity."). Customs' characterization of Plaintiff's adding of molasses to its sugar syrup as an artifice or deceit is not supported by case law. *See* discussion, *infra.*

Therefore, the Court can sustain none of the arguments presented by Customs or Defendant-Intervenor that molasses should be considered a foreign substance for the purpose of classifying Plaintiff's sugar syrup.

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[14] Customs seems to have abandoned the argument advanced in its revocation that molasses must be a "foreign" substance under subheading 1702.90 because "molasses syrups are classified in heading 1703" not in heading 1702, since the revocation held classification within subheading 1702.90.10/20.

C. The Record Evidence Does Not Support Classifying the Sugar Syrup Outside the Plain Meaning of Subheading 1702.90.40 HTSUS.

As discussed above, the sugar syrup in question is properly classified under the plain meaning of subheading 1702.90.40 HTSUS, and Customs' classification of the syrup outside of the plain meaning is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.[15] Customs and Defendant-Intervenor argue that the sugar syrup is not classified within the plain meaning of subheading 1702.90.40 HTSUS in several ways. First, they argue that the legislative intent of the relevant HTSUS provisions is to prevent anything that competes with raw or refined sugar from entering outside of the quota. Second, they argue that the sugar syrup is not to be classified in its condition as imported because the process is an artifice or deceit. Accordingly, use may be consulted since the judicial precedent recognizes an exception to the general rule that an article is to be classified in its condition as imported. Third, although neither defend the position, Customs reasoned that the sugar syrup in question would have fallen under the quantitative restrictions of Tariff Schedules of the United States ("TSUS") and thus properly are classified within the quantitative restriction of the HTSUS.

1. The Legislative History Does Not Demonstrate a Clear Legislative Intent to Exclude the Sugar Syrup at Issue.

As discussed *supra,* Customs argues that while falling into the literal language of subheading 1702.90.40 HTSUS, the sugar syrup

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[15] In a case brought under 28 U.S.C. § 1581(a) the court reviews Customs decision *de novo* on the record before the court. In a case brought pursuant to 28 U.S.C. § 1581(h) the agency record is reviewed and the standard of review is different. *See* discussion, *infra.* Even though the classification decision itself is a legal question, *see National Advanced Sys. v. United States,* 26 F.3d 1107, 1109 (Fed. Cir. 1994), the procedural posture of this case requires a discussion of why the agency action cannot be sustained under the applicable standard of review.

falls outside the spirit of the statutory provision because the purpose is to subject those products that compete directly with sugar to a quantitative quota restriction. In support of this proposition Customs refers to a 1937 hearing held before the Subcommittee of the House Committee on Agriculture. A witness testified that excluding sugar syrups with greater than a certain percentage of soluble non- sugar solids would allow syrup of cane juice to enter while barring other syrups that could be refined into products competing with raw and refined sugar. *See Sugar: Hearings on H.R. 5236 Before the Subcommittee of the House Committee on Agriculture,* 75th Cong. 41-44 (1937). Furthermore the witness testified that it was "practically impossible to define sugar sirup of cane juice satisfactorily for the purpose of administering quotas and taxes." *See id.* at 44.

From this discussion, Customs and Defendant-Intervenor draw the conclusion that any sugar syrup that competes with domestic raw or refined sugar must be classified in a provision that has a quantitative limitation, even if the product falls within the express and unambiguous language of a subheading not subject to such restrictions. Structurally and as a matter of sound statutory interpretation this argument fails.

Structurally, two provisions within Chapter 17 of the HTSUS explicitly allow competing sugar to enter without being subject to quantitative restrictions. Subheadings 1703.10.30 HTSUS and 1703.90.30 HTSUS both allow molasses to enter which is imported for commercial extraction of sugar or for human consumption. Additionally, not all sugar products are subject to TRQs such as: lactose syrup (1702.11.00 HTSUS); unblended glucose syrups (1702.30.40 HTSUS and 1702.40.40 HTSUS); unblended fructose syrups (1702.60.40 HTSUS); invert molasses (1702.90.35 HTSUS). Two things are thus apparent from the current quota scheme under the HTSUS. One is that Congress did not intend to exclude all competing sugar products from entry without quantitative limitations. Another is that the HTSUS is

fundamentally different from prior tariff law in the way it addresses sugar products.

As a matter of sound statutory interpretation the argument that the legislative history controls the express language of the statute also fails. For one thing, the legislative history cited here involves the testimony of one witness with the interrogatories of two members of Congress. To take this bit of legislative history and give it more weight than the statutory language would contravene longstanding principles detailing legislative history's proper weight. Further, it is not clear that the legislative intent Customs and Defendant-Intervenor propose is the only one. *See Robert G. Lynch Co. v. United States,* 49 C.C.P.A. 74, 79 (1962) (noting that "[t]he intent of Congress throughout the history of tariff legislation on sugar since 1913 has been to assess duties on the basis of the polariscopic sugar degree content, not upon the ultimate or intended use of the sugar."). The legislative history accompanying the enactment of the HTSUS states that it is meant to be revenue neutral and that the "[e]nactment of the tariff and quota treatment provided in this subtitle is intended to supersede and replace existing treatment as a matter of domestic law." *See* H.R. CONF. REP. NO. 100-576, at 548 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1581. When presented with many different Congressional intents and one clearly worded statutory provision, the better course is to follow the language of the statute. If Congress wishes to place the sugar syrup in question under quota it is free to do so through duly enacted legislation. However, Customs, as an executive agency may not; its role is to interpret and apply the HTSUS, *see* H.R. CONF. REP. NO. 100-576, at 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582. In this case its interpretation and application was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

2. Customs' Determination That Plaintiff Engaged in Artifice or Deceit Is Not Supported by the Record Evidence Nor Is it a Correct Application of Judicial Precedent, and Thus Is Arbitrary, Capricious, an Abuse of Discretion, and Otherwise Not in Accordance with Law.

Customs and Defendant-Intervenor argue that because molasses remains after the sugar syrup is refined following importation, and since some of the molasses is then returned to Canada, Plaintiff has engaged in artifice or deceit. The Court does not agree.

First, Plaintiff, pursuant to the provisions of 19 C.F.R. § 177, obtained an advance ruling on the classification of the merchandise. Neither Customs nor Defendant-Intervenor dispute that the submissions to Customs were legitimate. Rather, the claim is made that Plaintiff's failure to describe the post-importation processing deprived Customs of relevant information, and thus constituted artifice or deceit. However, the regulation clearly states that a description of an article's chief use is required only when germane to the relevant classification. *See* 19 C.F.R. § 177.2(b)(2)(ii) (1999). Since, as discussed *supra,* subheading 1702.90.40 HTSUS (nor for that matter subheadings 1702.90.10 and 1702.90.20 HTSUS) is not a use provision, Plaintiff was not required by the express language of the regulation to describe the sugar syrup's use. Furthermore, Customs had the opportunity to request an additional description, including a description of use when it asked for samples, and did not do so.

Second, following an investigation, the sugar syrup's use was conclusively made known to Customs and in an internal memorandum it was determined to be correctly classified within subheading 1702.90.40 HTSUS. *See* A.R. at IV(9). The memorandum states the principle of classification law that a good is to be imported in its condition as imported and that Customs cannot consider what happens to the goods once they are legally

imported. *See id.* Moreover, the memorandum states that the entire process is legal under the ruling.[16] *See id.*

Third, Customs had no record evidence on which to conclude that the sugar syrup produced in its condition in Canada was not at an intermediate stage of production.[17] In fact, the record evidence shows that the process of combining granular raw sugar with molasses, adding water and heating is common in sugar refining operations. *See* AR V(17) Statement of James C.P. Chen, ¶ 5; Statement of Jean-Pierre M. Monclin, ¶ 6 ("In sugar processing, such mixing of molasses with granular sugar is common practice."); Statement of Michael B. Inkson, ¶ 13 ("The Customs Service seems to have the misconception that the mixing of granular sugar and molasses is somehow abnormal. To the contrary, mixing molasses with higher purity streams (granular or liquid) is quite common in the production of sugar products."). Raw sugar's core is almost pure (99.6-99.8) sucrose, while the

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[16] While the Court does not consider this internal memorandum with respect to the ultimate classification of the merchandise, it is relevant on the issue of artifice or deceit. Customs' rationale was that it did not have critical information on the sugar syrup's use at the time it issued the initial ruling and that it reconsidered its position in light of information brought to its attention in the petition. The memorandum, written prior to the filing of the petition, directly contradicts Customs' rationale and is considered by the court for the limited purpose of whether the agency was deceived. As the memorandum indicates, the initial decision would have been unaffected if use had been, although not required to be, described.

[17] Both Customs and Defendant-Intervenor recognize that goods may legitimately be imported at various stages of manufacturing or processing, even if at an artificially interrupted point, to obtain lower rates of duties. *See Def.'s Br.* at 34; *Def.-Intervenor's Br.* at 36.

Customs asked the Plaintiff repeatedly for what commercial use the product had in its condition as imported without removing molasses. This question ignored the evidence Plaintiff submitted that combining raw sugar with molasses was a legitimate step in the refining process. Additionally, as discussed *infra,* the use of the merchandise was irrelevant to the proper classification.

surface of the crystal is covered with a partially dried syrup containing much less sucrose. *See* James C.P. Chen & Chung Chi Chou, CANE SUGAR HANDBOOK 485 (12th ed. 1993). Molasses, which contains much less sucrose, is combined with the raw sugar in the desired amount to obtain the final product. *See* AR V(17) Statement of James C.P. Chen, ¶ 5; Statement of Jean-Pierre M. Monclin, ¶ 4, 6; Statement of Michael B. Inkson, ¶ 13. It is noteworthy that Customs does not contest the general principle that combining raw sugar with molasses to adjust the purity is a common practice, yet it proceeds in what can only be characterized as a circular argument that in this case the process is designed to avoid the quantitative limitation.[18]

Moreover, the record evidence does not contain a single submission stating that the combination of *raw* sugar with molasses is not an intermediate step in the refining process. Notably, the submissions that mention the process at all state or imply that combining *refined* sugar with molasses is not a legitimate commercial practice. *See* AR I(1) Petition of January 14, 1998 at 1; II(20) Letter of September 25, 1998, from Sen. Kent Conrad, *et al.* V(1), (2), (4), (14). The Court has no reason to address that contention since the ruling letter request makes it clear, as well as does the record evidence, that Plaintiff's process combines granular raw sugar with molasses.[19] If the Defendant-Intervenor had information that the process described by the Plaintiff was incorrect, it was obliged to include such information on the agency record. Customs improperly based its decision on conclusory

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[18] The Court addresses the Defendant's brief in the discussion of the caselaw holding an importer has the right to fashion his or her merchandise to obtain the lowest rate of duty available, *infra*.

[19] The Robinson declaration, although not on the agency record, is remarkable for what it does not say more than what it does. In the declaration, both the premise and conclusion are based on the process of combining *refined* sugar with molasses. *See Def.-Intervenor's Br.* at Annex 24, Declaration of Jeffrey Robinson, ¶ 4, 7-8, 13-15.

assertions that refined not raw sugar was used to prepare the syrup. In its second chance, through the Robinson declaration, the Defendant-Intervenor again failed to include any information that refined sugar is used, nor, apparently, could it obtain an expert statement that the process of refining raw sugar with molasses is an illegitimate commercial process. Based on the record evidence, Customs had no basis to conclude that combining raw sugar with molasses was not a legitimate step in a refining operation. Accordingly, for each of the three reasons discussed above, Customs' determination that the process Plaintiff employs "is not a genuine step in manufacturing or production of an article [ ]," *see* Final Notice at 44, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

As a result of its flawed finding on the genuineness of the manufacturing process, Customs incorrectly applied the abundant judicial precedent holding that an article must be classified in its condition as imported. Customs noted that an importer "should be allowed to choose to import its merchandise at any step that obtains the most favorable treatment[ ]" and that "[i]f the syrup was further used in its condition as imported, in the next step in producing an article of commerce, this may satisfy the tariff engineering concept." *See* Final Notice at 44-45. Customs clearly stated its position: "that the processing in this case is not legitimate tariff engineering. But rather, it is merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate." Final Notice at 45. Customs had no basis to conclude that Plaintiff engaged in artifice or deceit to obtain a favorable classification of its merchandise and its application of the relevant judicial precedent governing tariff engineering as applied to the facts before it was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

The Supreme Court first announced the principle that a manufacturer has the right to fashion goods to avoid the burden of high duties, coincidentally, in a sugar case. *See Merritt v. Welsh,*

104 U.S. 694, 701 (1881).[20] At the time, the duty was assessed on sugar based on its color. The collector of the port of New York, defendant, claimed "that color was imparted to the sugars in the course of manufacture, by the use of an extra quantity of lime ... or by the introduction of molasses ...." *Id.* at 696 (the trial court found the evidence inadmissible). The Court went on to state the issue as whether "(supposing the sugars are not artificially colored for the purpose of avoiding duties *after* being manufactured) their dutiable quality is to be decided by their actual color ... or by their saccharine strength ...." *Id.* at 700 (emphasis added). In fact, the Court remarked "[i]f the manufacturer uses ... bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose?" *Id.* at 704. The Court noted that if color was added to the sugar following manufacture that "might be a different matter." *Id.* at 705. In this case, on the agency record before the Court, there is no evidence that *refined* sugar is combined with molasses to produce the sugar syrup, and thus the limitation on the Court's holding is not applicable.

After determining that Congress had clearly adopted a color test, the Court had this to say:

> Perhaps Congress may have acted under a mistaken idea that color would always indicate quality. Perhaps, up to the time that the law was passed, as the processes of manufacture had been conducted, color was an approximate, or general indication of quality. Suppose this to be so, does it derogate from the fact that color was the standard which Congress, with

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[20] The Court sees no reason, nor has it been presented with one by Customs, to distinguish between duties and quota restrictions. The effect of the TRQ is to impose a higher rate of duty on subject merchandise entering over the quota. Thus, the principle of fashioning merchandise to obtain the lowest rate of duty applies equally to fashioning merchandise to avoid a provision that will subject the merchandise to a TRQ.

> the lights which it had, saw fit to adopt? Does it not tend to fortify that fact? If it be found by experience that the standard is a fallacious one, can the executive department supply the defects of the legislation? Congress alone has the authority to levy duties. Its will alone is to be sought.

Id. at 700. In this case, Congress has provided a clear and unambiguous test: the quantity of soluble non-sugar solids. Following the Supreme Court in *Merritt,* this Court will not disturb Congress' will.

Furthermore, the Court set out the exception to the rule that an importer has the right to fashion his or her merchandise to obtain the lowest rate of duty "[s]o long as no deception is practised, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Id.* at 704. As discussed above, Plaintiff obtained an advance ruling describing the sugar syrup and its manufacturing process, and a subsequent investigation revealed that Plaintiff was complying with the terms of the advance ruling. Thus, Plaintiff's practice does not fall within the exception announced in *Merritt.* The Supreme Court, the Federal Circuit and its predecessor, and this court and its predecessor have repeatedly reaffirmed the principle in *Merritt.*

In *United States v. Schoverling,* 146 U.S. 76 (1892), an importer entered gunstocks and colluded with another firm to import the barrels separately to avoid the higher rate of duty assessed on fully assembled shotguns. The Court dismissed the United States' argument that the transaction was a fraud upon the statute by stating that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation." *Id.* at 81 (citing *Merritt,* 104 U.S. 694; *see also Seeberger v. Farwell*, 139 U.S. 608, 610 (1891) (holding that mixing just enough cotton with wool to secure a

lower rate of duty with no valid commercial purpose for the addition was within the importer's legal right).

In *United States v. Citroen,* 223 U.S. 407, 413-416 (1912), the issue was whether pearls, which had been drilled with holes and strung for display, were properly classified as jewelry, at a higher duty rate, or pearls. Relying on the plain language of the statute, the Court found that the pearls had to be classified as pearls in their natural state, not strung or set. *See id.* at 424. Once again, the Court used the analysis in *Merritt* that "when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate." *Id.* at 415 (citing *Merritt,* 104 U.S. at 704; *Seeberger,* 139 U.S. 608, 611).

On repeated occasions the United States Court of Customs Appeals and its successor courts have applied the *Merritt* principle. *See United States v. Hannevig,* 10 Ct. Cust. App. 124, 128 (1920) (holding that engine parts later used to make engines were properly classified as parts); *United States v. International Forwarding Co.,* 15 Ct. Cust. App. 198, 201 (1927) (holding that an importer could import one large blanket at a lower duty rate even if it later made it into two smaller ones); *Corporacion Argentina De Productores De Carnes v. United States,* 32 C.C.P.A. 175, 184 (1945) (holding that the addition of enough cereal to dog food to place it in a tariff provision with a lower rate of duty was within the importer's right to fashion merchandise to obtain a lower rate of duty);[21] *Robert G.*

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[21] *Corporacion Argentina* provides the legal answer to Customs' questions posed as to why Plaintiff does not add enough molasses so that at the end of the refining process there is no excess. As the court noted, the addition of the cereal held the meat together, thus serving a satisfactory food purpose. *See Corporacion Argentina,* 32 C.C.P.A. at 181-82. Customs does not dispute that combining granular raw sugar and molasses serves a valid purpose of adjusting the polarity of a sugar product, but argued that in this case the amount of molasses added was specifically for the purpose of exceeding the 6% requirement. Under the reasoning in *Corporacion Argentina,* adding

Lynch Co. v. United States, 49 C.C.P.A. 74, 80 (1962) (stating that in deciding the proper classification of the merchandise the importer's motivation was immaterial and ultimately affirming the finding that the merchandise was raw sugar dyed green); *accord Fries Bros. v. United States*, 4 Treas. Dec. 850, 852-54 (1901) (recognizing the principle that importers have the right to fashion merchandise to obtain the lowest rate of duty and that classification is decided on the merchandise at the time of importation but applying the exception that if something is added *after* manufacture it may be disregarded); *Pasadena Firearms Co. v. United States*, 56 Cust. Ct. 331, 337 (1966) (holding that the importer's intent to combine pistol barrels and frames imported in separate shipments was irrelevant to the correct classification).

Customs incorrectly applied the *Merritt* line of precedent to the evidence on the record. On repeated occasions courts have accepted artificial steps in the manufacturing process done to obtain the lowest rate of duty. Removing the string from pearls which were later restrung, colluding to import gunstocks separate from barrels later combined, adding sufficient amounts of cotton and cereal without any corresponding commercial purpose are all processes designed to obtain lower duty rates. Plaintiff's process, as described by the evidence on the agency record falls squarely within such practices. There was uncontroverted evidence on the record that Plaintiff's manufacturing process was common in sugar refining operations, but even if it were not, the motive of the importer in fashioning his or her merchandise is simply not a relevant inquiry. In fact, to the extent motive is relevant, an importer who intends to fashion merchandise solely for the purpose of obtaining the lowest rate of duty is within his or her legal right. Customs' disregard or misinterpretation, it matters not which, of

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enough molasses to exceed the 6% threshold is acceptable just as were the actions of the importer who "was careful to try to add that quantity [of cereal] which was regarded as substantial by the customs officials." *Id.* at 185 (plaintiff had sought advice beforehand as well).

the *Merritt* line of precedent was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Equally well established precedent, from the same sources as above, state that absent a use provision, an article is to be classified in its condition as imported.[22] In *Worthington v. Robbins,* the Supreme Court first annunciated the principle that goods are to be classified in their condition as imported. *See Worthington,* 139 U.S. at 341. The merchandise at issue was white hard enamel, which had various uses. *Id.* at 340. However, in the condition in which it was imported it could only be used, and in fact was used, to make watch faces. *Id.* Customs and the Defendant-Intervenor attempt to distinguish this case and others that build upon it on the ground that the products at issue have a recognized commercial identity regardless of subsequent use. *See e.g. Dwight v. Merritt,* 140 U.S. 213, 219 (1891) (applying the rule in *Worthington* to determine the correct classification of the merchandise); *Schoverling,* 146 U.S. at 82 (holding that the dutiable classification of gunstocks must be made on their condition as imported); *Citroen,* 223 U.S. at 414-15 (noting the well established rule that classification of articles must be determined on their condition as imported); *accord United States v. Irwin,* 78 F. 799, 801 (2d. Cir. 1897) (applying the rule in *Worthington* to gunstocks and barrels imported on the same ship and determining that in their condition as imported they were breach loading shotguns); *accord United States v. Winkler-Koch Eng'g. Co.,* 41 C.C.P.A. 121, 122 (1953) (noting "[i]t is academic that the classification of merchandise for duty purposes is governed by its condition as imported ...."); *Rico Import Co. v. United States,* 12 F.3d 1088, 1090 (1993) (holding that despite alleged uses articles must be classified in their condition as imported); *Mita Copystar America v. United States,* 21 F.3d 1079, 1082 (1994) (noting the well settled principle of law

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[22] That the competing provisions of the HTSUS are not use provisions is not disputed by the parties. Rather, Defendant and Defendant-Intervenor claim use can be looked at because of artifice or deceit, which as discussed above, is incorrect.

that merchandise is classified in its condition as imported thereby precluding classification as unmixed products because the fact that the substances had to be mixed prior to use was not relevant); *accord Cook v. United States,* 49 Cust. Ct. 11, 13 (1962) (holding that wheat unfit for human consumption at the time of importation though later used in an article fit for human consumption must be classified in its condition as imported); *Pasadena Firearms,* 56 Cust. Ct. at 334 (applying *Worthington* to the separate importation of pistol frames and barrels that the importer later combined); *Peter J. Schweitzer Div., Kimberly-Clark Corp. v. United States,* 57 Cust. Ct. 9, 13 (1966) (holding that flax straw was specifically enumerated without qualification as to use and despite stipulation that it was to be used for paper making, it had to be classified in its condition as imported); *Hardwood Manufacturing Co. v. United States,* 7 CIT 288, 292 (1984) (holding that absent a use provision, the article had to be classified on its condition as imported).

From the line of cases above, Customs and Defendant-Intervenor admit that an importer has the right to stop a legitimate manufacturing process at an artificial point and import the merchandise to obtain the lowest rate of duty. Based on the record it compiled, Customs had no basis to conclude that Plaintiff was not engaged in such a practice. All of the evidence suggested it was doing exactly that. The record evidence indicates and does not contradict that combining raw sugar with molasses is a legitimate step in the refining process. Additionally, it is undisputed that Plaintiff operates a refining operation in the United States which employs a substantial number of people. *See e.g. Schoverling,* 146 U.S. at 80 (noting that importing gun barrels and stocks promoted use of domestic labor). Thus, Plaintiff's operation falls directly within the line of cases which hold that an importer has the right to stop production at the most favorable time for duty purposes. Accordingly, Customs determination that it was appropriate to look at the sugar syrup's use following importation was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Against the overwhelming number of cases holding that an importer may fashion his or her merchandise to obtain the lowest rate of duty and that an article is to be classified in its condition as imported, two cases are cited as authority for the proposition that quota avoidance schemes are disallowed by the courts. Customs reliance on *Savannah Sugar Refining Corp. v United States* is misplaced. *See* Final Notice at 45, 50-51. As the court stated, the only important issue was whether "the imported merchandise [was] a sugar sirup within the meaning of paragraph 502 ... either directly or by virtue of the similitude provision ...." *Savannah Sugar Refining Corp.*, 20 C.C.P.A. 272, 277 (1932). Because the court in *Savannah Sugar Refining* was attempting to determine whether the article in question was sugar syrup within the meaning of the tariff provision, it did not engage in the analysis set forth in the *Merritt* line of cases, nor in the *Worthington* line and, therefore, should not be followed. Furthermore, there is no evidence in the opinion that the article was at an intermediate stage of processing, which, as discussed *supra,* is the case before this Court. Finally, Customs urges the Court to ignore the holding of the case and to employ the analysis set forth in dictum. *See Def.'s Br.* at 49. For reasons that need no explanation, the Court declines this invitation.

Customs relies also on *Arbor Foods, Inc. v. United States,* 9 CIT 119, 607 F. Supp. 1474 (1985), which is readily distinguishable. *See* Final Notice at 51. In that case, the importer mixed pure sugar of Canadian origin with corn syrup solids of United States origin in a warehouse designated as a foreign trade zone ("FTZ"). *See id.* at 120, 607 F. Supp. at 1476. The importer then brought the mixture from the FTZ territory into United States Customs territory, which were separated only by a yellow line. *See id.* After the product entered United States Customs territory the importer simply screened out the corn syrup solids and returned them to the FTZ territory for the next "importation." *See id.* The court recognized the principle that duty must be assessed on an article in its condition as imported but because the relevant tariff provision was one in which chief use was incorporated, found the principle did not apply. *See id.* at 122, 607 F. Supp. at 1477. Since

the doctrine of chief use required following an item into the commerce of the United States, it was appropriate for Customs to demand evidence of the possible uses of the product. *See id.*

It is clear that in the case before the Court a much different process is employed and a different analysis required. First, the sugar syrup in question can not be screened to obtain its constituent parts. Next, the evidence on the record demonstrates that combining raw sugar with molasses is a legitimate step in refining sugar. As noted by Customs in its brief, the sugar is in raw form before it enters the United States, while the final product is liquid sucrose. *See Def't Br.* at 18. In *Arbor Foods,* no transformation occurred, the product before and after importation was identical. Finally, while a great deal of the molasses is returned to Canada, some is sold for animal feed and some is lost in the process.[23] Furthermore, the molasses must be reconstituted prior to being used again. Since the process is different, the analysis must be that of the *Merritt* and *Worthington* line of cases. While it may be that Plaintiff interrupts the refining operation at an artificial point, or at one that other refiners do not, this fact alone does not matter since this is the importer's right in fashioning merchandise to obtain the lowest rate of duty. Finally, the *Arbor Foods* court employed a chief use analysis which is not relevant in the present case.

Another principle on which Customs relied was that courts may disregard a substance added to a product for a legitimate commercial purpose, even though substantial, in order to classify the merchandise. *See* Final Notice at 45, 50. In support of this principle, Customs cites *Aetna Explosives Co. v. United States,* 9 Cust. App. 298 (1919) and *Varsity Watch Co. v. United States,* 34 C.C.P.A. 155 (1947).

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[23] Plaintiff submitted sales invoices to Customs showing the sales of animal feed. Customs noted in the Final Notice that any sales were *de minimis* or fugitive uses. Regardless, the sale of some of the molasses is yet another reason this case is unlike *Arbor Foods.*

In *Aetna Explosives*, 9 Ct. Cust.App. at 299, the importer added twenty percent of sulphuric acid to nitric acid for the purpose of protecting the iron tank cars in which the acid was shipped. The importer desired only to import nitric acid, but the rules of the Interstate Commerce Commission required the addition of the sulphuric acid and the amount. *See id.* The merchandise was classified as a chemical mixture, subject to a higher rate of duty than nitric acid. *See id.* The court stated that the true rule was that "the introduction of a quantity of sulphuric acid solely for the purpose of rendering the transportation of nitric acid safe, and which does not result in a usable mixture, is more in the nature of an act of shipment than an admixture ...." *Id.* at 306. The court applied the principle that in such circumstances, "the construction of the statute most favorable to the importer is to be adopted." *Id.* at 307 (citation omitted).

Aetna Explosives is wholly inapplicable to the present case. First, it does not fall within the controlling *Merritt* or *Worthington* line of precedent. In *Aetna Explosives* the importer added the sulphuric acid not of its volition but to comply with regulations. In this regard, *Aetna Explosives* has nothing at all to do with importers fashioning merchandise to obtain the lowest rate of duty. *See id.* at 306 ("[I]t is ... neither a usable mixture *nor one which the importer purposely, as a process of manufacture, started to make such.*") (emphasis added). Furthermore, the court analyzed the term "mixture" in the statute and determined that the addition of the sulphuric acid did not fit the definition. *See id.* Finally, the court supported its holding by referring to a principle of construction that ambiguities in a tariff/revenue statute are resolved in favor of the importer. The court's qualification further limits the relevance of *Aetna Explosives* to the present case.

In *Varsity Watch*, the importer of watch cases added an amount of gold so small that it was difficult to obtain a quantitative analysis. *See Varsity Watch*, 34 C.C.P.A. at 157. The importer claimed that the gold should have been disregarded under the rule *de minimis non curat lex*, the law does not concern itself with

trifles. Relying on the plain language of the statute, the court found that Congress intended to include all watch cases containing gold, no matter how small the amount. *See id.* at 163. Because the importer intended to add the gold to enhance the value of the watch, and the addition was not accidental, unintentional or undesired, the court found that the rule of *de minimis non curat lex* did not apply.

Customs cited *Varsity Watch* for its summation of the cases applying the *de minimis* rule. The *Varsity Watch* court noted:

> that certain amounts of an ingredient, although substantial, may be ignored for classification purposes depending upon many different circumstances, including the purpose which Congress sought to bring about *by the language used* and whether or not the amount used has really changed or affected the nature of the article and, of course, its salability.

Id. at 162-63 (emphasis added). In the statute under consideration, Congress has employed a test, the very nature of which requires deciding the amount of soluble non-sugar solids present. If the syrup contains greater than six percent, the syrup falls under subheading 1702.90.40 HTSUS, if it does not, under subheading 1702.90.10 HTSUS. In this instance, the statute has concerned itself not with trifles, but with an exact measurement. Moreover, like *Corporacion Argentina,* the importer has fashioned the merchandise to obtain the lower rate of duty. *See Corporacion Argentina,* 32 C.C.P.A. at 185. Accordingly, to the extent Customs relied on the *de minimis* rule to exclude the soluble non-sugar solids contained in the molasses its action was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Since the record evidence demonstrates that Plaintiff did not engage in artifice or deceit to obtain the initial ruling under subheading 1702.90.40 HTSUS and the long line of judicial precedent illustrates that Plaintiff engaged in legitimate tariff

engineering, classifying the sugar syrup outside of the plain meaning of the statute was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

3. The TSUS Provisions Are Not Relevant In Determining the Correct Classification of the Sugar Syrup.

Although neither Customs nor Defendant-Intervenor press the argument in their briefs,[24] Customs provided further justification for its classification under subheading 1702.90.10 HTSUS on the basis of the quota provisions in the TSUS. *See* Final Notice at 51-53. After examining various provisions of the TSUS, Customs concluded that the sugar syrup would have been classified in item 155.75 TSUS and subject to an absolute quota.[25] Customs is wrong for several reasons.

First, it is apparent that the TSUS involves an entirely different law than the HTSUS provisions governing sugar products. The HTSUS breaks sugar products out into several subheadings: 1701 for cane or beet sugar and chemically pure sucrose in solid form; 1702 for other sugars, including sugar syrups; 1703 for molasses

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[24] Indeed, when asked by the Court at oral argument if Customs was abandoning its position counsel replied it was not, but noted that it was not a particularly strong position.

[25] Customs stated:

> 155.75, TSUS, provided for sugars, sirups, and molasses, described in this subpart, flavored: and sirups, flavored or unflavored, consisting of blends of any of the products described in the subpart. Under item 958.10, blended sirups in item 155.75, containing sugars derived from cane or beet and capable of being further processed or mixed with similar ingredients and not for the ultimate consumer, and under item 958.15, articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, were subject to a 'none' absolute quota.

Final Notice at 52.

resulting from the extraction or refining of sugar; and 1704 for sugar confectionery (including white chocolate), not containing cocoa. Customs itself recognized that when the TSUS was converted to the HTSUS, "Item 155.75, TSUS, in part, became subheadings 1702.30.40, 1702.40.00, and 1702.60, HTSUS." Final Notice at 52.

Second, under the TSUS the sugar syrup in question would more likely have been classified under TSUS 155.35. The superior heading provided for "Sugars, syrups, and molasses, derived from sugar cane or sugar beets" and TSUS heading 155.30 provided for "Not principally of crystalline structure and not in dry or amorphous form ... [containing less than six percent soluble non-sugar solids]." However, since the sugar syrup in question contains greater than six percent soluble non-sugar solids it would have fallen within TSUS 155.35, an "Other" provision not subject to quota and covering those items enumerated in TSUS 155.30 but containing more than six percent soluble non-sugar solids.

Customs' determination that the sugar syrup would have fallen within TSUS 155.75 fails to account for TSUS General Interpretive Rule 10(c), which provided that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it ...." Since TSUS 155.35 was the more specific heading, the sugar syrup would have fallen within it, not subject to quota.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the sugar syrup before it, as described in AR I(37-38), requesting a ruling, is correctly classified under subheading 1702.90.40 HTSUS. Customs' rationale for classifying the sugar syrup in a manner inconsistent with the plain meaning of the statute was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Judgment will enter accordingly.

JUDGMENT

This case having been duly submitted for decision; and the Court, after due deliberation, having rendered a decision herein;

Now therefore, in conformity with said decision, it is

ORDERED that Plaintiff's Motion for Judgment Upon an Agency Record is granted; and it is further

ORDERED that Customs Headquarters Ruling Letter 961273 revoking New York Ruling Letter 810328 is hereby declared unlawful; and it is further

ORDERED that the sugar syrup at issue in this case and as described in Administrative Record File I, Documents 37-38 is properly classified under subheading 1702.90.40 HTSUS.

DATED this / 19 / day of October 1999.

/s/ Judith M. Barzilay
JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

[Filed Feb. 1, 2000]

HEARTLAND BY-PRODUCTS, INC., *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant,* and UNITED STATES BEET SUGAR ASSOCIATION, *Defendant-Intervenor.*	No. 99-09-00590 Judith M. Barzilay, *Judge*

OPINION

BARZILAY, Judge.

I. INTRODUCTION

This matter is before the Court pursuant to Defendant and Defendant-Intervenor's USCIT R. 59 Motion for Reconsideration. Defendant and Defendant-Intervenor ("Movants") desire the Court to reverse its judgment issued with *Heartland By-Products, Inc. v. U.S.*, 74 F. Supp. 2d 1324 (CIT 1999), familiarity with which is presumed. For the reasons stated herein, the motion is denied and the original judgment is affirmed in all respects.

II. BACKGROUND

In *Heartland By-Products*, 74 F. Supp. 2d 1324, the Court held that the decision of the Customs Service to revoke New York Ruling Letter 810328 was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. In addition, the Court held that the correct classification of Plaintiff's product was under subheading 1702.90.40 HTSUS. Movants request reconsideration on two grounds: first, that the entire agency record was not before the Court at the time it rendered its decision; and second, that the appropriate remedy was remand to the agency.[1]

III. STANDARD OF REVIEW

It is settled law that the disposition of a motion for reconsideration and/or rehearing lies within the sound discretion of the court. *See Asociacion Colombiana de Exportadores de Flores v. United States,* 19 F. Supp. 2d 1116, 1118 (CIT 1998) (and cases cited therein). Furthermore, a rehearing is not granted to allow a losing party to relitigate the case, but rather to address a fundamental or significant flaw in the original proceeding. *See id.* A decision will not be disturbed unless it is manifestly erroneous. *See id.*

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[1] While the Defendant declined to join Defendant-Intervenor's points regarding the necessity of the complete agency record and its advocacy of remand to the agency, *see Def.'s Mot. for Reh'g, Recons. and/or Amendment of Findings of Fact* at n. 5 ("*Def.'s Br.*"), it supports those arguments by Defendant-Intervenor which raise material points of mistake of law or facts that Defendant-Intervenor claims occurred in the Court's opinion. *See Def.'s Br.* at 4. Alternatively, the Defendant moves for amendment of certain factual findings pursuant to USCIT R. 52.

IV. DISCUSSION

A. There Was No Fundamental or Significant Flaw in the Original Proceeding.

Movants claim that the expedited nature of the original proceeding deprived them of the ability to place the entire administrative record before the court.[2] Defendant-Intervenor claims that it did not have an opportunity to participate in the scheduling, while the Defendant maintains that portions of the briefing schedule were achieved through duress. On September 22, 1999, the Court held a hearing on the briefing schedule proposed by Plaintiff. In part due to the Defendant's late filing,[3] a recess was taken and the parties were directed to consult and attempt to reach an agreement on a briefing schedule. When the hearing reconvened, the parties informed the Court that a mutually satisfactory briefing schedule had been achieved. Defendant-Intervenor's main complaint about the expedited time frame was that it did not have access to the certified administrative record until October 4, 1999 and therefore, could not place the entire administrative record before the court. Yet, the Defendant-Intervenor's opposition brief contained thirty-five annexes, almost all from the administrative record. Defendant placed approximately twenty-one exhibits in its annexes, for a combined

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[2] Defendant-Intervenor also claims that the nature of the administrative proceedings precluded its full participation. The Movants' arguments regarding the inability to place material before the agency are wholly unavailing. Defendant-Intervenor's petition began the revocation proceedings, which were noticed and opened to comments. Defendant's contention, that as a matter of administrative law the proceeding was informal, is irrelevant. *See Def.'s Reply Mem. to Pl.'s Resp. to Def.'s Mot. for Reh'g, Recons. and/or Amendment of Findings of Fact* at 9 ("*Def.'s Reply*"). Defendant-Intervenor had the opportunity to place material before the agency prior to the agency's decision and did so. *See, e.g.*, AR(I) 1, 10; AR(II) 63; AR(V) 1.

[3] Defendant filed a proposed briefing schedule a few minutes prior to the commencement of the hearing.

total of fifty-six. While neither Defendant nor Defendant-Intervenor placed the entire administrative record before the Court, it is evident that Defendant-Intervenor had access to it and was able to bring to the Court's attention ample portions it believed were most supportive of its case.[4] *See also* discussion, *infra* Part IV.B.

Defendant's claim of duress also fails to persuade the Court that a fundamental or significant flaw existed in the original proceeding. While the Defendant represents that it consented to portions of the briefing schedule out of duress, Defendant's proposed briefing schedule belies this contention, notwithstanding the Defendant's claim to the contrary. *See Def.'s Reply* at 6 n. 9. Accordingly, although the original proceeding was expedited, Movants have not pointed to a fundamental or significant flaw warranting rehearing.

B. Nothing in the Court's Decision Was Manifestly Erroneous.

Defendant-Intervenor contends that the Court's decision was manifestly erroneous because it did not have the entire agency record before it. On October 4, pursuant to the terms of the scheduling order, the Defendant filed a certified index of the administrative record. Additionally, Defendant filed an annex containing those portions of the record that it believed supported the agency's decision. Defendant-Intervenor also filed an annex with documents from the agency record. Prior to the Defendant

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[4] Similarly, Defendant-Intervenor claims that the Court notified the parties it would not accept any further written submissions, and therefore placing the entire administrative record before the court would have been unacceptable. First, nine days elapsed between the established time to designate the agency record and the Court's notice to the parties. Second, it is difficult to see how the Defendant-Intervenor thinks the agency record would have been considered an additional written material in this context: "[The Court has] reviewed the written submissions and [is] satisfied that all relevant issues have been briefed adequately by both sides. Therefore, under the terms of the order issued September 24, 1999, no further written material will be accepted." Letter from Court to Counsel of 10/13/99.

and Defendant-Intervenor's filings, Plaintiff submitted an annex containing numerous record documents, which the Court later cross-referenced to the certified index of the agency record.

On the basis of the record placed before it by the parties, the Court was able to decide the case. In essence, this is a case that does not involve a dispute over the facts, but over the law applied to them.[5] As discussed at length in the Court's opinion, Customs turned a blind eye to the controlling legal precedent that an importer has the right to fashion merchandise to obtain the lowest rate of duty. Ignoring that established bedrock of Customs jurisprudence rendered its conclusions arbitrary, capricious, an abuse of discretion and not in accordance with law. The Court is satisfied, based upon its review of the additional portions of the record cited by the parties in this motion, that the record before it when it issued its opinion contained the essential facts concerning Heartland's sugar syrup. As discussed in the opinion, Customs is required to classify merchandise according to the applicable law. In that regard, Customs does not acting as policymaker but in an adjudicative capacity. Once the Court had the essential facts before it, the remainder of its task was to review the law and to determine whether Customs acted in accordance with it.

Moreover, while Defendant-Intervenor claims that the Administrative Procedure Act ("APA") mandates review of the entire agency record, a review of the statute and caselaw contradicts the Defendant-Intervenor's position.[6] Section 706 of

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[5] *See, e.g.*, AR(VI) 122.

[6] Not a single case that Defendant-Intervenor cites contravenes the principle that a court may rely upon the parts of the record cited by the parties. Rather, the cited cases discuss when supplementing the record with material not designated as part of the record by the agency is appropriate. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548-49 (9th Cir. 1993); *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); *Natural Resources Defense Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975); *Miami Nation of Indians v. Babbitt*, 979

the APA provides that in deciding whether an agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, "the court shall review the whole record *or those parts of it cited by a party* ...." 5 U.S.C. § 706 (1994) (emphasis added). The reason for this seems rather straightforward. In an adversarial system, where review of a lengthy, multi-volume administrative record is necessitated, the parties that participated in the proceedings before the agency are in a better position than the court to highlight those portions of the record supporting their position. While the APA provides that a court must review the whole record, it allows the court to rely upon the portions of the record designated by the parties to be essential. The present case does not involve a request to supplement the record with material that the agency considered but did not designate as part of the record. Thus, it was not error for the Court to render judgment on the basis of the record placed before it by the parties.[7]

Accompanying its motion for reconsideration, Defendant-Intervenor provided three expert declarations about sugar refining

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F. Supp. 771, 775-79 (N.D. Ind. 1996); *Lloyd v. Illinois Reg'l Transp. Auth.*, 548 F. Supp. 575, 590 (N.D. Ill. 1982).

[7] The Court has reviewed carefully the additional documents Defendant-Intervenor claims render Customs' decision proper. However, none of the record documents cited convince the Court that it committed a manifest error in the original decision. Indeed, Defendant-Intervenor's reliance on an August 5, 1998, electronic mail message from the Customs Service's independent chemist undercuts its position. The chemist noted that "[o]ur position [ ] is still that the product in issue is a 'sham product' made with the sole intent of circumventing quotas but we truly don't know where we could classify it, other than 1702.90.40." AR(VI) 114 at 2, AR(VI) 159 at 2. The chemist further states that "we support 100% the classification provided by the NIS [national import specialist]. Chemical analyses support classification in heading 1702.90.40." AR(VI) 159 at 1. In an undated faxed document, which seems to be about a year later, the same chemist concludes that classifying Heartland's product in an HTSUS provision subject to quota is correct. AR(VI) 122. As mentioned, *supra*, this document is a legal characterization of the facts.

operations. Since these were not part of the administrative record they cannot form a basis for upholding the agency's decision.[8] Nor do they persuade the Court in the limited sense for which they may be considered that an error of fact or law was committed. Defendant-Intervenor contends that the Court committed a manifest error of fact by stating that Congress did not intend to exclude all competing sugar products from entry under quotas by citing several sweetening products that enter without being subject to quota. *See* 74 F. Supp. 2d at 1336-37. In a misreading of the opinion,[9] Defendant-Intervenor claims the Court found that lactose syrup, unblended glucose syrups, unblended fructose syrups, invert molasses, chemically pure fructose syrups and certain cane or other molasses were products that compete with sugar. However, the court made no such finding.

In the first sentence of the paragraph at issue, the Court noted that subheadings 1703.10.30 HTSUS and 1703.90.30 HTSUS allow products that compete with sugar to enter without being subject to quantitative restriction.[10] 74 F. Supp. 2d at 1336. The second sentence of the paragraph refers to the various syrups listed above and merely refers to them as sugar products not subject to TRQs. The third sentence notes that "Congress did not intend to exclude all competing sugar products from entry without quantitative limitations." *Id.* at 1336. A careful reading of the

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[8] This point is uncontested. *See Def.-Intervenor's Reply Mem. in Supp. of its Mot. for Recons. of the Ct's J. of Oct. 19, 1999* at 27.

[9] Indeed this point is misstated in the Defendant-Intervenor's brief which reads: "Second the Court found that other 'competing sugar products,' such as lactose syrup, unblended glucose syrup, unblended fructose syrup and invert molasses, are not subject to the TRQ." *Def.- Intervenor's Mem. in Supp. of Reh'g* at 32 (emphasis added). The opportunistic addition of "competing sugar products" significantly distorts the context and meaning of the sentence.

[10] Defendant-Intervenor does not dispute that these provisions which allow the import of molasses for the commercial extraction of sugar are not subject to quota.

portion of the Court's opinion at issue demonstrates that it was the first sentence, and that sentence only, to which this statement applied. The next and final sentence of the paragraph refers to the various syrups by saying that the HTSUS treats sugar products in a fundamentally different way from prior tariff law. *See* 74 F. Supp. 2d at 1336-37. Thus, no error was committed. The court found only that subheadings 1703.10.30 and 1703.90.30 HTSUS are provisions that allow products that compete with sugar to enter without quantitative limitations.[11]

Finally, the Movants argue that the court exceeded its authority by declaring that Plaintiff's sugar syrup was correctly classified under subheading 1702.90.40 HTSUS. Defendant posits that the role of the court is limited to declaring the agency's revocation of NYRL 810328 published at 33 Cust. Bull. No. 35/36 at 41-54 (Sept. 8, 1999), including its attached HQ 961273, to be unlawful and invalid. The Court does not agree. Although the statute limits review of the agency decision to the administrative record, *see* 28 U.S.C. § 2640(e) (incorporating 5 U.S.C. § 706), and limits to declaratory the relief which can be granted, *see* 28 U.S.C. § 2643(c)(4), it vests discretion in the court to determine the appropriate relief. *See id.* Under the facts and circumstances of this case, it was appropriate to declare the correct classification of the merchandise at issue as it was Customs' illegal classification decision that was the basis for holding the revocation unlawful and invalid.

V. CONCLUSION

For the foregoing reasons, the Court concludes that neither a fundamental or a significant flaw occurred in the original proceeding, nor did the court commit a manifest error of law or fact. Accordingly, the Court will enter an order denying the motion

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[11] The court provided additional reasons, which are not challenged here, for its determination that a clear legislative intent to exclude the sugar syrup at issue did not exist. *See* 74 F. Supp. 2d at 1336-38.

for reconsideration and the Defendant's additional and alternative USCIT R. 52 motion to amend.

ORDER

Upon careful consideration of the motions for rehearing and/or reconsideration and amendment of findings of fact and the Plaintiff's opposition thereto, and upon all papers filed and proceedings had herein, it is hereby

ORDERED that Defendant's Motion for Rehearing, Reconsideration and/or Amendment of Findings of Fact is denied; and it is further

ORDERED that Defendant-Intervenor's Motion for Reconsideration of the Court's Judgment of October 19, 1999 is denied; and it is further

ORDERED that the Courts' Opinion and Judgment entered in *Heartland By-Products, Inc. v. United States,* 74 F. Supp. 2d 1324 (CIT 1999) is affirmed in all respects.

SO ORDERED.

DATED this / 1 / day of February 2000.

/s/ Judith M. Barzilay
JUDGE

APPENDIX E

HTSUS 1702

1702 Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; caramel:

* * * *

1702.90 Other, including invert sugar:

Derived from sugar cane or sugar beets:

Containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids:

* * * *

1702.90.10 Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions [tariff-rate quota]

1702.90.20 Other[1]

* * * *

Other:

1702.90.35 Invert molasses

1702.90.40 Other

[1] See subheadings 9904.17.08-9904.17.16 [tariff-rate quota].

APPENDIX F

HTSUS 1703

1703	Molasses resulting from the extraction or refining of sugar:
1703.10	Cane molasses:
1703.10.30	Imported for (a) the commercial extraction of sugar or (b) human consumption
1703.10.50	Other
1703.90	Other:
1703.90.30	Imported for (a) the commercial extraction of sugar or (b) human consumption
1703.90.50	Other

Supreme Court, U.S.
FILED
JUL 1 2002
CLERK

No. 01-1469

In the Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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22 pages

QUESTION PRESENTED

Whether the Customs Service correctly applied the text of subheading 1702.90.10/20 of the Harmonized Tariff Schedule of the United States in classifying the imported merchandise involved in this case.

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In the Supreme Court of the United States

No. 01-1469

HEARTLAND BY-PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 264 F.3d 1126. The opinions of the Court of International Trade (Pet. App. 24a-62a, 63a-71a) are reported at 74 F. Supp. 2d 1324 and 86 F. Supp. 2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2001. A petition for rehearing was denied on December 4, 2001. Pet. App. 22a-23a. On February 25, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to April 3, 2002, and the petition was filed on that date.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Harmonized Tariff Schedule of the United States that are set out at Pet. App. 72a-73a, the following statutory provision is involved in this case:

19 U.S.C. 1625(c) provides:

> A proposed interpretive ruling or decision which would—
>
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
>
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

STATEMENT

1. Canadian Blending of Windsor, Ontario, is a unit of ED&F Mann, a large, London-based commodities business. Canadian Blending operates a process that combines granular raw sugar with molasses and water by heating and agitating the mixture. This process

produces a mixture that contains approximately 92% sucrose and more than 6% soluble non-sugar solids on a dry-weight basis. C.A. App. 76, 163, 109. After its production, this mixture is imported into the United States by petitioner Heartland By-Products, Inc., an American unit of ED&F Mann. During the times relevant to this case, the same person acted as President of Heartland and Manager of Canadian Blending. C.A. App. 109.

After importation, the molasses added in the Canadian Blending process is removed in a refining process performed by Heartland. The refining process produces liquid sucrose (which is 99% sucrose on a dry-weight basis) and molasses as a by-product. C.A. App. 116. The liquid sucrose is sold by Heartland in the domestic market for the production of food, including cereal, ice cream, and candy. C.A. App. 116-117, 257. The molasses by-product is then shipped by Heartland back to Canadian Blending, where it is reused by that company for the production of additional volumes of the same sugar mixture to be reimported by Heartland.[1] C.A. App. 117.

2. In April 1995, Heartland sought a ruling from the United States Customs Service concerning proposed importations of the sugar syrup mixture from Canadian Blending. Pet. App. 3a; C.A. App. 159. In seeking that ruling, Heartland provided information regarding the composition of the imported article but failed to disclose the post-importation processing of the imported mixture in the United States and the intended use of the liquid sugar in the domestic market. C.A. App. 74-

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[1] Heartland asserts that approximately 5% of the molasses is lost in the refining process, left as an impurity in Heartland's final product, or sold by Heartland for use in animal feed. C.A. App. 117, 257.

77. Based on the limited information made available by Heartland, Customs issued NY Ruling Letter 810328 dated May 15, 1995, which classified the Canadian Blending mixture under subheading 1702.90.40 of the Harmonized Tariff Schedule of the United States (HTSUS). Pet. App. 25a-26a. That subheading, which applies to sugar syrups that contain soluble non-sugar solids over "6 percent * * * by weight of the total soluble solids," is not subject to sugar quota restrictions. *Id.* at 2a-3a; see *id.* at 72a.

The United States Department of Agriculture (USDA) monitors the domestic supply of sugar in setting tariff rate quotas (TRQ) that limit the volume of sugar imports. The objective of the quota is to ensure that an adequate supply of sugar is maintained at reasonable prices in the domestic market. Pet. App. 2a-3a; C.A. App. 1187-1189; HTSUS Additional U.S. Note 5(a)(i). The TRQ applies to all imported sugar classified under HTSUS subheading 1702.90.10/20. As relevant here, that subheading covers sugar syrups "[c]ontaining soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids." See Pet. App. 72a. In setting the TRQ, the USDA uses official forecasts to compare the domestic sugar supply and domestic sugar demand. C.A. App. 1187. The USDA adjusts the TRQ so that the supply level will meet the demand level. *Ibid.* The USDA maintains a minimum limit for the TRQ, however, below which the quota cannot go. C.A. App. 1187-1188.

After Heartland began processing the Canadian Blending importations in mid-1997, Heartland's liquid sugar increased the quantity of sugar available in the United States. C.A. App. 237, 451, 577, 396-397. When

the total amount of domestic supply and the minimum TRQ level exceed the actual need of the United States, the oversupply depresses the price of sugar. C.A. App. 1188. Heartland's importations, free of the TRQ, had precisely that effect on the domestic price. C.A. App. 237, 451, 577, 396-397.

3. Shortly after sales of Heartland's liquid sugar began to impact prices in the domestic market, the United States Cane Sugar Refiners' Association and the United States Beet Sugar Association filed a joint submission with the Customs Service on January 14, 1998. Their submission questioned the appropriateness of classifying Heartland's mixture under HTSUS subheading 1702.90.40, exempt from the TRQ. The Associations alleged that Heartland's liquid sugar product competed directly with sugar subject to the TRQ. Pet. App. 5a-6a.

The Customs Service advised Heartland of the joint petition and invited Heartland to respond to the allegations raised by the Associations. C.A. App. 152-153. The agency asked Heartland (i) to present detailed factual information concerning the commercial identity and use of the product it imported and (ii) to respond to the allegations of the Associations that the sole purpose for the addition and extraction of molasses was to avoid a tariff rate quota. C.A. App. 244-245. Although Heartland responded, its submissions did not address these issues. C.A. App. 250-273, 313-329, 708-710, 711-713.

Following further unsuccessful efforts to obtain relevant information from Heartland, the Customs Service issued a public notice of its proposal to revoke the prior favorable letter ruling to Heartland (NY Ruling 810328) pursuant to 19 U.S.C. 1625(c). The agency's notice of proposed revocation-published in Volume 33, No. 22/23 of the *Customs Bulletin* dated June 9, 1999—

provided a 30-day comment period to close on July 9, 1999. The public comment period was thereafter extended at Heartland's request until August 9, 1999. C.A. App. 402-407. After the notice-and-comment period expired, the Customs Service issued a Headquarters Decision on August 25, 1999, that revoked the prior letter ruling (HQ 961273). This Headquarters Decision was duly published in the *Customs Bulletin* on September 8, 1999. Pet. App. 7a-8a; C.A. App. 884-892. In that final revocation ruling, the Customs Service determined that Heartland's imported mixture had no commercial identity or use in its condition as imported. Pet. App 8a. The agency further concluded that the addition of molasses prior to importation, and the extraction of the same molasses after importation, was merely an artifice to disguise the sugar product that is subject to quota restrictions. *Ibid.*; C.A. App. 889-890. The Customs Service further determined that the molasses and associated impurities added to the raw sugar in Canada constituted a "foreign substance" that must be excluded in determining the applicability of HTSUS subheading 1702.90.10/20. Pet. App. 8a. Pursuant to 19 U.S.C. 1625(c), the Customs Service specified that its revocation ruling was effective as of November 8, 1999.

4. On September 20, 1999, Heartland commenced this action to challenge the Customs Service determination in the United States Court of International Trade. That court granted judgment in favor of Heartland. Pet. App. 24a-62a. The court reasoned that "[t]he plain language of the tariff provision describes the imported product" (*id.* at 35a) and that "Customs was simply wrong to conclude" that the addition of molasses to the sugar introduced a "foreign substance" to be excluded in determining application of the tariff provision. *Id.* at

39a-40a. The court stated that the molasses was not a "foreign substance" because it was "composed of the same chemical ingredients in varying proportions" as the sugar syrup. *Id.* at 40a. The court therefore held that the Headquarters Decision erred in revoking the prior letter ruling. *Id.* at 40a-41a.[2]

5. a. The Federal Circuit reversed. Pet. App. 1a-21a.[3] The court of appeals concluded that the agency's interpretation of the relevant provisions of the HTSUS, as expressed in HQ 961273, was reasonable and persuasive, and therefore entitled to deference under the standards of this Court's decisions in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 16a.. The court emphasized that, by its express terms, HTSUS subheading 1702.90.10/20 requires the agency to exclude "foreign substances" in determining whether the sugar syrup contains 6% or less by weight of soluble non-sugar solids. Pet. App. 15a. The court noted that the phrase "foreign substances" in HTSUS subheading 1702.90.10/20 is not defined in the statute and that "Customs therefore had to interpret the term 'foreign substances' in order to classify Heartland's sugar syrup." *Id.* at 16a. The court of appeals emphasized that, in the specific commercial context in which this tariff provision applies, the agency's interpretation of the phrase "foreign substances" to include molasses that is *added* to the raw sugar in Canada and then immediately *extracted* in the United States is reasonable, entitled to "deference * * * under *Mead* and

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[2] The Court of International Trade denied the motion for reconsideration filed by the Customs Service. Pet. App. 63a-71a.

[3] The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. 28 U.S.C. 1295(a)(5).

Skidmore" and should therefore not be disturbed by the courts. *Ibid.*

b. In a separate concurring opinion, Judge Friedman concluded that the Customs Service had properly determined that the addition of molasses prior to importation and its extraction after importation is merely an artifice designed to allow Heartland to escape a higher rate of duty and the TRQ. Pet. App. 21a. He noted that the decisions of this Court have long held that "a prescribed rate of duty" may not "be escaped by resort to disguise or artifice." *Id.* at 19a (quoting *United States* v. *Citroen*, 223 U.S. 407, 414-415 (1912)). Because the process employed by Heartland is a mere "artifice" to escape the prescribed rate of duty, and because the original letter ruling had been based on a less than complete description of the relevant facts, Judge Friedman concluded that the Service had properly revoked that ruling in this case. Pet. App. 21a. In response to the suggestion that Heartland had relied on the prior ruling, Judge Friedman explained that "whatever financial or other problems Heartland now faces because of the revocation of the New York Ruling Letter are the result of its own actions, for which it must bear full responsibility." *Ibid.*

c. The court of appeals thereafter denied the petition for rehearing with suggestion for rehearing en banc. Pet. App. 22a-23a.

ARGUMENT

The decision of the court of appeals comports with longstanding precedent. It does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Petitioner errs in contending (Pet. 11) that the decision in this case conflicts with the general principle

that merchandise is ordinarily to be classified for customs purposes in its condition as imported, regardless of its post-importation use. See *Worthington* v. *Robbins*, 139 U.S. 337, 341 (1891). The Customs Service determination challenged by petitioner in this case in fact *does* classify the imported merchandise in its condition as imported. The applicable tariff provision (HTSUS subheading 1702.90.10/20) requires the agency to exclude "foreign substances" in determining whether the sugar syrup contains 6% or less by weight of soluble non-sugar solids. Pet. App. 15a. The agency determined that, in the particular commercial context involved in this case, the introduction of molasses to the sugar syrup before its importation by petitioner was the addition of a "foreign substance" within the meaning of this provision. *Ibid.* See pages 13, 16, *infra*. That determination is based on application of the specific text of this narrow tariff provision to the particular goods imported. Pet. App. 15a.

The Federal Circuit correctly sustained that administrative determination. The court noted that deference to the agency's interpretation of this narrow provision is justified by the "specialized experience" the agency has "in classifying goods." Pet. App. 15a. See *United States* v. *Mead Corp.*, 533 U.S. at 234. The court concluded that (Pet. App. 18a):

> Heartland does not argue that its sugar syrup contains less than 6% by weight of soluble non-sugar solids when the weight of the molasses solids is excluded. Therefore, in view of our determination that Customs' interpretation of the term "foreign substances" should not be disturbed, we uphold the revocation ruling classifying Heartland's sugar syrup under 1702.90.10/20 HTSUS.

The decision of the court of appeals is thus based squarely on the narrow language of this specific tariff provision. It does not rely on the post-importation uses of the classified merchandise. The decision of the court of appeals does not conflict with any other decision, and it does not warrant review by this Court.

b. Moreover, petitioner has misdescribed the general principle on which it seeks to rely. The relevant principle is not that post-importation uses of merchandise may not be considered—it is instead that, absent a "disguise or artifice," an article is to be classified in its condition as imported. *United States* v. *Citroen*, 223 U.S. 407, 415 (1912). See *Simod America Corp.* v. *United States*, 872 F.2d 1572 (Fed. Cir. 1989); *Savannah Sugar Refining Corp.* v. *United States*, 61 Treas. Dec. 401, aff'd, 20 C.C.P.A. 272 (1932), cert. denied, 288 U.S. 615 (1933); *United States* v. *Hannevig*, 10 Ct. Cust. 124, 128 (1920).

The term "artifice" has been defined for this purpose as "a carefully and delicately prepared contrivance for doing indirectly what one could not do directly." *Savannah Sugar Refining Corp.* v. *United States*, 61 Treas. Dec. at 406. In the *Savannah Sugar* case, the Customs Court applied this "artifice" definition in classifying a mixture of sugar, water and formaldehyde as sugar, where the water and formaldehyde were added prior to importation solely in an effort to obtain a lower duty rate. The court noted that (*id.* at 406-407):

> The plaintiff could not import raw sugar directly and get the benefit of the lower rate which it seeks to have applied to this importation. Therefore, it undertakes to procure the more favorable rate by indirection through putting the sugar into a solution of water and preservatives. Sugar was bought,

> sugar was used, sugar was disguised, and on the disguised product plaintiff seeks to pay the tariff applicable to sugar sirups. The facts seem to make a clear case of resort to disguise or artifice.

As this Court emphasized in *United States* v. *Citroen*, 223 U.S. at 415, an effort to disguise a product "described in a particular paragraph of the tariff act" as something else "is simply a fraud on the revenue and cannot be permitted to succeed."

Judge Friedman correctly applied this settled rule in his concurring opinion in this case. He noted that the factual record assembled by the agency plainly demonstrates that the introduction of molasses to the sugar syrup before its importation was "merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate." Pet. App. 20a. The operations performed by petitioner and its related Canadian supplier were "not legitimate" business operations but were instead designed solely to evade tariff rules. *Id.* at 19a-20a. As Judge Friedman concluded, there is ample evidence to support the agency's determination that the introduction of molasses to the sugar syrup in Canada, and its immediate removal upon importation in the United States, is merely an artifice that is not to be respected in application of the tariff laws. *Id.* at 20a-21a.[4] See also page 13, *infra*.

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[4] As noted above, the Federal Circuit decided this case on the narrower ground that the molasses in the imported merchandise was a "foreign substance" for purposes of subheading 1702.90.10/20. Pet. App. 18a. The fact that petitioner improperly employed a mere "artifice" in an effort to avoid the correct classification of this article is an additional basis for sustaining the judgment in this case that the panel majority did not reach.

2. a. Petitioner errs in contending (Pet. 18-25) that it is inappropriate for Customs to consider the pre-importation processing of the imported article that added molasses to the imported sugar. Petitioner asserts (Pet. 24) that such processing is irrelevant because it is entitled to fashion its product in whatever manner it desires in order to obtain the most favorable tariff treatment.

The court of appeals correctly concluded in this case, however, that the governing tariff provision in fact *requires* examination of the pre-importation production process. HTSUS subheading 1702.90.10/20 specifies that, in determining whether the sugar syrup contains "non-sugar solids * * * equal to 6 percent or less by weight of the total soluble solids," the Customs Service must first "exclud[e] any foreign substances that may have been added or developed in the product." *Ibid.*; see Pet. App. 2a-3a. Because subheading 1702.90.10/20 requires the exclusion of "foreign substances that may have been added or developed in the product," Customs was expressly required by the statute to examine the entire circumstances of the transaction, including pre-importation processing. Pet. App. 16a-17a. Indeed, no other method exists for evaluating whether a foreign substance was "added or developed in the product" prior to importation. *Id.* at 20a. The plain language of the statute involved in this case thus refutes petitioner's claim that the agency may not examine the pre-importation production process to determine whether an excludable "foreign substance" was "added or developed in the product." HTSUS subheading 1702.909.10/20.

b. The record supports the determination of the Customs Service that the addition of the molasses by the Canadian affiliate of petitioner represented the

addition of a "foreign substance" within the meaning of HTSUS subheading 1702.90.10/20. The term "foreign substance" is not defined in the tariff provisions or in the *Explanatory Notes* to the HTSUS.[5] The legislative history is also silent as to the intended meaning of the term. In this context, the court of appeals correctly concluded that the interpretation of that phrase by the agency that Congress charged with the responsibility for enforcing this statute is entitled to substantial weight. Pet. App. 16a.

In applying that statutory phrase in this case, the Customs Service noted that the industry practice in refining sugar is to *separate* sugar from its impurities, including molasses. Customs noted that, despite this industry practice, petitioner's Canadian affiliate took sugar from which impurities had been removed and then added one of those impurities—molasses—back *into* the sugar product. The addition of molasses to the sugar directly contravened standard refining practices and served no viable commercial purpose—a fact that was demonstrated by petitioner's practice of immediately *removing* the molasses from the sugar syrup following importation and promptly *returning* the molasses to its Canadian affiliate. Pet. App. 6a. On this record, there was ample basis for the agency's conclusion that the addition of the molasses into the sugar product constituted "a foreign substance * * * added or developed in the product" within the meaning

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[5] "While the *Explanatory Notes* do not constitute controlling legislative history, they do offer guidance in interpreting HTS subheadings." *Lonza, Inc.* v. *United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995). See also *Bausch & Lomb, Inc.* v. *United States*, 148 F.3d 1363 (Fed. Cir. 1998); *Sharp Microelectronics Tech., Inc.* v. *United States*, 122 F.3d 1446 (Fed. Cir. 1997).

of this narrow tariff provision. HTSUS subheading 1702.90.10/20. The agency's reasonable interpretation of the statute was therefore properly upheld by the court of appeals. Pet. App. 16a-17a.

c. Although the analysis applied by the agency and the court of appeals in this case is based on, and properly implements, the detailed text of this specific tariff provision, it also comports with the more general method of implementing broader tariff provisions as well. For example, in *Merritt* v. *Welsh*, 104 U.S. 694 (1881), on which petitioner relies (Pet. 18), this Court held that an importer may ordinarily fashion articles to obtain the most favorable rate of duty "provided he can do it without injuring their marketability" and provided that "no deception is practised." 104 U.S. at 704. But commercially "artificial[]" steps may not be employed to effect an evasion or "fraud on the revenue." *Id.* at 705.[6]

That same conclusion was reached in the early decision in *Fries Bros.* v. *United States*, 4 Treas. Dec. 850 (1901). In concluding that an artificial addition to an imported chemical compound hid the true nature of the product vanillin, the decision explained that "merchants

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[6] In *Merritt*, the tariff rate on imported sugar depended on its color as measured by a commercially recognized standard. The tariff contained no express exclusions or limitations as to the source or cause of the color of the sugar. The imported product in *Merritt* was sugar that had been treated with molasses to make it "more salable"; this treatment also made the sugar darker and thus eligible for a lower duty rate. 104 U.S. at 704. In holding in *Merritt* that the color of the sugar for tariff purposes could be based on the color imparted by the molasses during its normal manufacture, the Court emphasized that if this color had instead been "artificially imposed" after the sugar was initially manufactured "it might be a different matter." *Id.* at 705.

have the right to so manufacture their merchandise that it may escape the higher rates of duty; but this must be done during the process of manufacture, and as part of it, not by a separate operation upon a completed article which is specially provided for in the law." *Id.* at 852.

None of the decisions on which petitioner relies supports the proposition that commercially artificial methods may be applied to avoid tariff classification rules. In *United States* v. *Citroen*, 223 U.S. 407 (1912), this Court held that unstrung, drilled pearls were classifiable under that description—rather than as pearls set or strung—even though the pearls had been strung at one time prior to importation. The Court noted that, although the pearls had been temporarily strung prior to importation for purposes of display, they were imported and sold to the ultimate consumer unstrung. *Id.* at 413-414. No commercial "disguise or artifice" existed in *Citroen* (*id.* at 415), for the purchaser had a legitimate reason to buy unstrung pearls and she intended to, and did, add more pearls to form a necklace. *Id.* at 414.[7]

In the present case, by contrast, the pre-importation processing demonstrates in great detail that a deception was planned and executed. Petitioner added molasses for no commercial reason other than artificially to increase the content of soluble non-sugar solids in the

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[7] Neither *United States* v. *Schoverling*, 146 U.S. 76 (1892), nor *Seeberger* v. *Farwell*, 139 U.S. 608 (1891), supports petitioner's position. As with *Citroen*, bona fide commercial activities led to the importation of products recognized in commerce in each of those cases. The evidence in each case also established that neither involved deceptive or artificial processes that reversed normal manufacturing methods in an effort to avoid express tariff restrictions. See 146 U.S. at 80-81; 139 U.S. at 611.

product above 6% at importation in an effort to avoid classification under HTSUS subheading 1702.90.10/20. The addition of molasses to the product prior to importation was plainly a commercially artificial act (see note 6, *supra*) for it was necessary to refine the syrup in the United States to remove the same molasses that had been added prior to importation. Pet. App. 17a. No legitimate commercial reason justified petitioner's obvious attempt to avoid the plain text of the tariff statute. See *ibid.*

d. In any event, the general principles on which petitioner mistakenly seeks to rely are simply not implicated in this case. As the Federal Circuit correctly determined (Pet. App. 18a), the plain language of this specific tariff provision mandates an evaluation of whether the pre-importation processing "added or developed" a "foreign substance" into the product. HTSUS subheading 1702.90.10/20. Applying the text of this narrow provision, the agency properly concluded that the last-minute addition of molasses, and its subsequent removal immediately after importation, represented the addition of a foreign substance within the meaning of this provision. Pet. App. 17a. As the court of appeals emphasized (*ibid.*):

> When the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance.

That narrow holding was sufficient to resolve this case. Pet. App. 17a-18a. The decision of the court of appeals represents a straightforward application of the specific and narrow text of HTSUS subheading

1702.90.10/20. It does not, as petitioner incorrectly asserts (Pet. 25), introduce broad uncertainty into international commercial transactions. The decision of the court of appeals merely enforces the specific text of a single tariff provision that bars the use or addition of "foreign substances" to evade its restrictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
AND
UNITED STATES BEET SUGAR ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Customs Service's determination that the substance imported by petitioner was subject to subheading 1702.90.10/20 of the Harmonized Tariff Schedule of the United States, on the ground that a temporary additive to the substance constituted a "foreign substance" under the subheading.

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IN THE

Supreme Court of the United States

No. 01-1469

HEARTLAND BY-PRODUCTS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
AND
UNITED STATES BEET SUGAR ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT UNITED STATES BEET SUGAR ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 264 F.3d 1126. The opinions of the Court of International Trade (Pet. App. 24a-62a, 63a-71a) are reported at 74 F. Supp. 2d 1324 and 86 F. Supp. 2d 1339, respectively. The Customs Service ruling letter upheld by the court of appeals is reported at 33 Cust. B. & Dec. No. 35/36, at 41-47 (Aug. 25, 1999), and is reproduced *infra* at App. 1a-27a.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2001. Pet. App. 1a. The petition for rehearing and rehearing en banc was denied on December 4, 2001. *Id.* at 22a-23a. On February 25, 2002, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 3, 2002. The petition for a writ of certiorari was filed on April 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Under the Harmonized Tariff Schedule of the United States ("HTSUS"), the volume of sugar imports is controlled by a Tariff Rate Quota ("TRQ"). The TRQ is administered by the Secretary of Agriculture, who sets the level of the quota. *See* HTSUS Ch. 17, Additional U.S. Notes 5.

With a few narrow exceptions, the TRQ applies to all imports of raw and refined sugar. One narrow exception is based on the amount of soluble non-sugar solids contained in the syrup. Specifically, HTSUS subheading 1702.90.10/20 subjects to the TRQ all sugar syrups "derived from sugar cane or sugar beets" and "[c]ontaining soluble non-sugar solids (excluding any foreign substances . . . added or developed in the product) equal to 6 percent or less by weight of the total soluble solids." In contrast, sugar syrups containing a higher percentage by weight of non-sugar solids are subject to HTSUS subheading 1702.90.40, which provides a much lower tariff rate for molasses and other products that do not compete directly with sugar. Pet. App. 3a

2. In the mid-1990s, petitioner Heartland By-Products, Inc. concocted a scheme to import sugar syrup into the United States while avoiding the TRQ applicable to imports of raw sugar and sugar syrups. Its plan was to take a product otherwise classified under subheading 1702.90.10/20 and thus subject to the TRQ and mask it so that it resembled in

form a syrup classified under HTSUS subheading 1702.90.40. Pet. App. 3a-4a.

Petitioner's strategy was to reverse a portion of the sugar manufacturing process. The production of crystalline raw cane or beet sugar generally requires a manufacturer first to crush cane stalks or to slice and boil sugar beets to produce raw sugar juice, and then to separate the raw sugar from the remaining syrup through a series of vacuum pan crystallizations and centrifugal separations. C.A. App. 1097.[1] The extracted sucrose, known as raw sugar, is in crystalline form surrounded by a thin film of molasses. *Id.* The liquid that remains after the final centrifugal separation is known as "final molasses," or blackstrap molasses. No further sugar can be obtained from it and it is not edible for human consumption. *Id.*

Although the entire sugar manufacturing process involves separating the sugar from the molasses, App. 7a-8a, petitioner's Canadian affiliate would do the opposite. After deriving crystalline raw sugar by *separating* it from molasses as described above, it would *add* blackstrap molasses and water to the sugar prior to importation. Pet. App. 6a-7a; App. 2a, 7a. That process yielded a solution appearing to contain soluble solids of which slightly more than 6% were non-sugar solids, thus bringing it within subheading 1702.90.40. After importation, however, petitioner would simply re-remove the molasses, leaving a syrup containing virtually pure sucrose. This sugar was then sold in competition with domestic sugar syrups and other products imported under the TRQ. App. 7a-9a; C.A. App. 252-57. Petitioner would return the removed molasses to Canada where the scheme was repeated by adding the molasses to more sugar syrup destined for the United States. Pet. App. 19a.

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[1] Citations to "C.A. App." are to the appendix filed with the court of appeals below.

3. As part of this scheme, in 1995 petitioner applied to the local Customs Service ("Customs") office for an advance tariff classification ruling that its mixture was properly classified under HTSUS subheading 1702.90.40. *Id.* at 3a-4a. In its request, petitioner described the mixture merely as a "sugar syrup . . . composed of approximately 6.5% but not equal to or less than 6.0% of soluble non-sugar solids of cane and/or beet origin." *Id.* at 4a. The only other information petitioner provided was that in the process of production, "[g]ranular raw sugar would be combined with molasses . . . to produce a brown sugar of approximately 93 percent polarity," which would "then be dissolved in hot water." *Id.* Petitioner did not describe the purpose of adding the molasses or the fact that the molasses was re-removed immediately after entry into the United States. Based on this limited information, the Customs Area Director issued an advance ruling that classified petitioner's syrup under subheading 1702.90.40. *Id.* at 4a-5a.

The effects of the imported syrup on the domestic sugar industry were immediate and pronounced. Customs observed that "two Louisiana sugar refiners claim[ed] to have lost sales of 25,000 tons of sugar per year as a result of [petitioner's] importations," and that petitioner's imports led the Department of Agriculture to decrease the volume of sugar that could permissibly be imported each year under the low TRQ. App. 9a.

In January 1998, the United States Beet Sugar Association and the United States Cane Sugar Refiners' Association responded by asking Customs Headquarters to reclassify petitioner's import. Pet. App. 5a. Customs then began an extensive investigation into whether there was any commercial reason for adding the molasses to the sugar and whether the syrup in its imported state had any commercial use without removal of the molasses. App. 3a. That investigation uncovered the whole story regarding the process by which petitioner recombined molasses with raw sugar for importation

purposes, details that petitioner had failed to disclose to Customs when it requested the advance classification ruling and that Customs ultimately deemed "essential" to determining the proper classification of petitioner's syrup. *Id.* at 14a.[2]

After almost two years of proceedings during which it gave petitioner ample opportunity to respond to its questions, Customs determined that petitioner's syrup should be classified under subheading 1702.90.10/20. In a lengthy published Headquarters Ruling Letter, Customs provided a detailed factual and legal analysis of the syrup and its proper classification under the tariff laws. *Id.* at 1a-27a. Customs concluded that petitioner's mixture had no commercial identity or use in its condition as imported. *Id.* at 7a, 16a. Moreover, Customs found,

> [I]t makes no financial sense, absent a desire to avoid the sugar tariff, for a conventional sugar operation to either enrich a liquid (syrup or molasses) stream with sugar or to add molasses to such a stream. Sugar operations separate sugar from the liquid or molasses phase, they do not separate the

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[2] In addition to the expert views of Customs' scientists and chemists, the evidence received by Customs included evidence from sugar industry representatives that petitioner's product was not "commercially viable" (C.A. App. 143) and had no use other than avoiding the TRQ, and that none of their member companies had ever made such a product in the United States, had ever been asked to make such a product, had ever sold such a product, or was aware of any other company that did so beside petitioner (C.A. App. 149-50); comments from Florida Crystals, the Domino Sugar Corporation, the International Sugar Policy Coordinating Commission of the Dominican Republic, and other industry participants that petitioner's fabrication of its import could have no conceivable purpose and would make no financial sense absent a motive of tariff evasion (C.A. App. 411, 424, 437, 448); and extensive evidence from members of the domestic sugar industry of the harm that petitioner's operation had already caused to the United States' sugar program (*see, e.g.*, C.A. App. 435-38).

> sugar and then introduce molasses to the sugar, effectively nullifying the refining operation.

Id. at 8a. This anomalous process of pre-importation addition and post-importation extraction of molasses, Customs concluded, was an artifice created solely for the purpose of avoiding the TRQ. *Id.* at 7a, 16a.

Customs also found that the molasses added to the syrup was a "foreign substance" within the meaning of subheading 1702.90.10/20. *Id.* at 25a. Customs observed that "molasses is derived as a by-product from the refining of sugar cane or sugar beets and it is not derived as sugar from the refining of sugar cane or sugar beets." *Id.* Accordingly, Customs found that to introduce such a substance with all its impurities into a syrup containing raw sugar that had already been separated from molasses was to introduce a "foreign substance" into the syrup. *Id.* Thus, the weight of the re-introduced molasses in the syrup was properly excluded when determining whether the syrup exceeds the 6% threshold necessary to escape classification under subheading 1702.90.10/20. *Id.*

Finally, Customs concluded that permitting petitioner's syrup to evade the TRQ would circumvent Congress' clear intent that all products competing with domestic sugar be subject to the TRQ. *Id.* at 8a-9a.

4. Petitioner challenged Customs' ruling in the Court of International Trade ("CIT").[3] Pet. App. 24a. Approximately three weeks before the Customs ruling was to take effect, the CIT announced that Customs' decision was arbitrary and capricious, and that it would grant judgment for petitioner. *Id.* at 24a-62a. When the Association pointed out in its motion for reconsideration that the CIT failed even to consider the entire administrative record as a whole, *id.* at 64a, the CIT

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[3] Petitioner's suit was against both the United States and the United States Beet Sugar Association, which intervened as a defendant. Pet. App. 29a.

stated that it did not need to do so because the case did "not involve a dispute over the facts, but over the law applied to them," *id.* at 67a.

Respondents appealed to the Court of Appeals for the Federal Circuit, which reversed the CIT's judgment. *Id.* at 1a-21a. Applying this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court held that Customs' ruling was "entitled to deference because of its persuasiveness." Pet. App. 14a. Specifically, the court observed that Customs' ruling was "issued pursuant to a notice and comment process, during which numerous members of the sugar industry . . . submitted comments in support of and in opposition to the ruling." *Id.* at 15a. Observing that Customs' ruling responded to the principal issues raised in the comments it received from the various interested parties, the court concluded that "Customs gave thorough consideration to the ruling" and that the "ruling is supported by a logical and well-reasoned explanation published in the Customs Bulletin." *Id.*

The court's decision to defer to Customs' ruling focused in particular on the finding that the molasses petitioner reintroduced into its syrup for import purposes was a "foreign substance" under HTSUS subheading 1702.90.10/20. The court observed that because "the relevant provision of the HTSUS does not indicate to what a substance must be 'foreign' in order to be a 'foreign substance' excluded from the solids content calculation of 1702.90.10/20," Customs was required to "interpret the term 'foreign substances' in order to classify Heartland's sugar syrup." *Id.* at 16a. Reviewing that interpretation deferentially as required by *Mead* and *Skidmore*, the court concluded that "[t]he fact that molasses and raw sugar both are derived from sugar cane or sugar beets does not undermine Customs' interpretation" that "the molasses [petitioner] adds to raw sugar to make its sugar syrup is a foreign substance." *Id.* As the court explained, "[w]hen the purification of a raw product results in the pro-

duction of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance." *Id.* at 17a. Thus, the court held that the CIT erred in concluding that a substance derived from sugar cane or sugar beets can never be a foreign substance under subheading 1702.90.10/20. *Id.*

Judge Friedman concurred. *Id.* at 18a-21a. He concluded that because "the addition and removal of the molasses from the sugar served no manufacturing or commercial purpose, the conclusion is irresistible that the only purpose of this strange arrangement was to create a fictitious product that, because of the temporary presence of the molasses, qualified for the lower rate of duty on sugar imports containing specified amount of non-sugar solids." *Id.* at 19a. Judge Friedman agreed with Customs that granting petitioner the benefit of a lower tariff rate based on its fictitious product would violate this Court's well recognized rule that an importer may not evade the "prescribed rate of duty [for its product] by resort to disguise or artifice." *Id.* (quoting *United States v. Citroen*, 223 U.S. 407, 414-15 (1912)). Judge Friedman concluded that the record fully supported Customs' finding that "the processing in this case is not legitimate tariff engineering" but merely an effort to engage in "disguise or artifice intended to escape a higher rate of duty," *id.* at 19a-20a (internal quotations and citation omitted), and that Customs was "fully justified in revoking the [advance classification] [r]uling [l]etter that applied the lower tariff rate based upon such 'disguise or artifice,'" *id.* at 21a.

REASONS FOR DENYING THE WRIT

The narrow precedent established by the court of appeals' decision in this case is that Customs permissibly exercised its revocation authority to treat the molasses in petitioner's import as a "foreign substance" under HTSUS subheading 1702.90.10/20, where petitioner had sought to avoid the proper tariff classification by seeking to secure an advan-

tageous advance ruling on the basis of incomplete information, and where a subsequent and thorough investigation revealed that the omitted information was critical to determining the correct classification. That decision is consistent with this Court's precedents, is correct, and will have no untoward consequences.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

A. The Decision Below Is a Routine Application of This Court's Decisions in *Mead* and *Skidmore*.

1. The court of appeals' decision is a straightforward application of this Court's holding in *Mead* to the facts of this case. *Mead* held that *Skidmore* governs the extent to which Customs classification rulings are entitled to judicial deference. Quoting *Mead*, the court of appeals explained that the deference owed to a classification ruling depends on "its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." Pet. App. 14a (quoting *Mead*, 533 U.S. at 235); *see also id.* (quoting *Skidmore*, 323 U.S. at 140, to the same effect).

The court of appeals made no new law of any significance in applying *Mead* and *Skidmore* to the particular facts of this case. Instead, it simply applied the criteria identified in *Mead* and *Skidmore* and concluded that Customs' revocation ruling is entitled to deference. *Id.* at 14a-15a. In so doing, the court noted Customs' "specialized experience" in the classification of goods, *id.* at 15a (quoting *Mead*, 533 U.S. at 234), and stressed that Customs applied its special expertise in this case only after "a notice and comment process, during which numerous members of the sugar industry . . . submitted comments in support of and in opposition to the ruling," *id.*; *see Mead*, 533 U.S. at 234 (observing that *Skidmore* deference may be appropriate in light of the "broader investigations and information available to the

agency") (internal quotations and citation omitted). Customs' ultimate ruling, the court found, was responsive to the principal issues raised in the comments it received, and was "supported by a logical and well-reasoned explanation published in the Customs Bulletin." Pet. App. 15a.

In the absence of any textual definition of the phrase "foreign substance" as it is used in HTSUS subheading 1702.90.10/20, the court of appeals found that Customs' considered application of the term to the instant case was entitled to deference. Specifically, the court held that "[w]hen the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance." *Id.* at 17a. Accordingly, the court held that it was reasonable for Customs to have concluded that the molasses petitioner added to its raw sugar syrup for importation purposes constituted a "foreign substance" under subheading 1702.90.10/20.

Petitioner identifies no case construing subheading 1702.90.10/20 with which this conclusion is even arguably in tension, for no such case exists. In the absence of any contrary precedent on point, the court's decision to credit Customs' well-reasoned, considered decision was simply a routine and fact-bound application of the principles outlined in *Mead* and *Skidmore* to a different section of the tariff schedule.

2. Similarly, review by this Court of another *Mead/Skidmore* tariff case is simply unwarranted at this time. As this Court is undoubtedly aware, *Mead* was decided only last year and settled with finality the issue of "whether a tariff classification ruling by the United States Customs Service deserves judicial deference." *Mead*, 533 U.S. at 221. This Court in *Mead* resolved that question of law in the affirmative. *Id.* at 235. Respondent respectfully submits that scarce judicial resources would be poorly spent were this Court to

take another case to reaffirm a limited and straightforward holding of such recent vintage.

B. The Decision Below Is Consistent With This Court's Tariff Classification Precedents.

Petitioner's claim (Pet. 10) that the decision below "depart[s] . . . from the principles of classification law mandated by the decisions of this Court" is inaccurate, and is a product of petitioner's own mischaracterization of those guiding principles.

1. Petitioner relies almost exclusively on two default interpretive rules: that Congress is generally presumed to prefer that goods be classified based on their condition as imported, *id.* at 11-17, and that importers may generally fashion their goods to secure the lowest duty, *id.* at 18-25. But as this Court has long emphasized, those two default presumptions are constrained by a third, limiting rule that an importer may not "escape[]" "a prescribed rate of duty . . by resort to disguise or artifice." *Citroen*, 223 U.S. at 415; *see also Falk v. Robertson*, 137 U.S. 225, 232 (1890); *Merritt v. Welsh*, 104 U.S. 694, 704 (1881) ("So long as no deception is practised," tariff classification is based on condition of goods when they are imported); *United States v. Hannevig*, 10 Ct. Cust. 124, 128 (1920) ("[T]he law is well settled that in the absence of deception, disguise, or artifice resorted to for the purpose of perpetrating a fraud upon the revenue, imported merchandise must be classified with reference to its condition when imported."); *Savannah Sugar Ref. Corp. v. United States*, 20 C.C.P.A. 272, 277 (1932); *United States v. Breed*, 24 F. Cas. 1222, 1224 (C.C.D. Mass. 1832) (No. 14,638) (Story, J.) ("[A] mere change of form will not authorize a party to evade a law, or escape from its priorities.").

The precedents of this Court and the lower courts applying this rule uniformly teach that while an entity may import a product at any stage of its manufacture so as to achieve a

favorable tariff rate, and may even modify a finished product in a way that achieves a favorable tariff classification, it may not evade an otherwise-applicable tariff by resorting to artifice or disguise.[4] The Court made this point clear in *Merritt*, which petitioner unsuccessfully attempts to rely upon in support of its argument. *See* Pet. 18-25. In *Merritt*, the Court

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[4] *Compare Citroen*, 223 U.S. at 407 (drilled pearls that have not yet been strung, a raw material with a clear commercial identity and use, entitled to receive favorable tariff classification specifically provided for by Congress and applicable to pearls that are not "strung or set"); *United States v. Schoverling*, 146 U.S. 76, 79-82 (1892) (gun stocks and gun barrels, both products known to commerce in a normal stage of manufacture, classified in condition as imported despite importer's intent to assemble them into shotguns, to which a higher tariff applied, after importation); *Seeberger v. Farwell*, 139 U.S. 608, 611 (1891) (finished dress goods ready for immediate sale allowed lower duty for blended fabrics because importers had woven cotton thread into wool fabric); *with, e.g.*, *Savannah Sugar Ref. Corp.*, 20 C.C.P.A. at 277-78 (importer not permitted to avoid tariff applicable to raw sugar by mixing sugar with formaldehyde because "[n]o such article was known in trade or commerce" and "it was not prepared or made up . . . in its imported state . . . as an article utilizable for any purpose except to be refined,"; it thus "was not intended [to] enter the general commerce of the country in the state in which it was imported"; and its only purpose was "experiment[ing] with the tariff law applicable to raw sugar rather than with the product itself"); *Aetna Explosives Co. v. United States*, 9 Ct. Cust. 298, 302-03 (1919) (import of nitric acid mixed with sulphuric acid to prevent it from exploding not entitled to lower duty applicable to "chemical mixture" because no commercial advantage was gained by mixing nitric acid with sulphuric acid in this manner, and mixture "was susceptible of no use other than as nitric acid, which must before use be again treated"), *aff'd*, 256 U.S. 402 (1921); *Fries Bros. v. United States*, 4 Treas. Dec. 850, 851-52 (1901) (importers not permitted to avoid tariff applicable to vanillin by mixing manufactured vanillin with benzyl-chloride because "the article imported is vanillin, . . . to which has been added a foreign ingredient, after its completion, . . . to . . . disguise and mask the article," and while "merchants have a right to so manufacture their merchandise that it may escape the higher rates of duty . . . , this must be done during the process of manufacture, and as part of it, not by a separate operation upon a completed article which is specially provided for in the law") (citing *Merritt*, 104 U.S. 694).

was unanimously of the view that, had the manufacturer there added coloring back to a finished product that had already been processed to remove the color solely to avoid the tariff laws, it would not have been entitled to the benefit of its evasiveness. *See* 104 U.S. at 704-05 ("[I]f after the sugars are manufactured, . . . coloring matter is artificially imposed, . . . [t]he sugars would then have a different color from that which belonged to them when manufactured," and "[t]his might be held to be a fraud on the revenue."); *id.* at 705-06 (Matthews, J., dissenting) (duty should be assessed according to sugar's natural color "if, during the process of manufacture, . . . color is artificially produced by foreign matter, not necessary to the production of the sugar, and introduced for the express purpose of counterfeiting a color of a lower grade, in order to evade the law and escape the duties imposed").

That is, in effect, exactly what petitioner did in this case. As Customs found, "[s]ituations in which there are no commercial purposes for a process, such as the addition and then the removal of molasses from sugar to avoid classification in a tariff provision subject to quota, cross the line of permissible fashioning to one of artifice to obtain favorable tariff treatment by the avoidance of a tariff rate quota." App. 18a. Customs' determination not to permit petitioner to enjoy the benefit of this deception is consistent with—indeed, compelled by—the longstanding rule against "disguise or artifice," and the court of appeals' decision upholding Customs' ruling thus fits comfortably within this Court's tariff classification precedents.[5]

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[5] Petitioner's attempt (Pet. 24) to read Customs' "disguise or artifice" finding out of the record of this case reflects a misunderstanding of the nature of judicial review of agency action. Although the CIT disagreed with Customs' finding on this point, the court of appeals is not bound by the CIT's assessment of the administrative record. Rather, "[i]n reviewing a decision of the Court of International Trade, [the Federal Circuit] applies anew the statutory standard of review applied by that court to the

2. Moreover, Customs' attention to the possible commercial uses of petitioner's syrup in its imported form was an application of a routine method of determining the identity of a manufactured product. In *Mead*, for example, the Court observed that Customs had adopted a definition of "diary" as used in the HTSUS that "reflect[ed] commercial usage and hence the commercial identity of these items in the marketplace." 533 U.S. at 225 (internal quotations and citation omitted); *see also, e.g.*, *Worthington v. Robbins*, 139 U.S. 337, 338 (1881) (finding that white enamel, which had been imported in a partially manufactured state and which could be used for various purposes after further manufacturing processes were applied, was not classifiable as watch material because it could not so be used without further refinement); *Robert G. Lynch Co. v. United States*, 49 C.C.P.A. 74, 76 (1962) (examining potential uses of imported raw sugar to determine its proper classification under Tariff Act provisions mirroring the HTSUS provisions at issue here); *see also* cases cited *supra* note 4. Thus, examination of an import's commercial identify and its potential end uses is a recognized part of the tariff classification process.

The point here is not that Customs may always tax an import according to the form it will ultimately take in the *future* after additional steps in the manufacturing process. As petitioner notes, *see* Pet. 12 n.3, in the absence of a use provision in the relevant HTSUS subheading Customs generally does not impose tariffs based on the ultimate form an import will take when put to commercial use. Rather, the point here is that in determining whether the *present* form of an import is the product of "disguise or artifice," Customs may inquire

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agency's decision." *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999); *see* Pet. App. 10a (citing *Inland Steel*); *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir.1992). Accordingly, the CIT's decision in no way displaced the factual findings made by Customs, and it was on the basis of those findings that the court of appeals upheld the revocation ruling at issue.

into the extent, if any, of the import's potential uses in its current form. *Cf. Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 905 (Fed. Cir. 1999) ("Classification is an exercise in assessing the commercial status of particular goods . . . .").[6] That is exactly what the Supreme Court itself did in *Worthington*, when it found that enamel could not be classified as watch material because it could be used for various purposes in its current form. *See* 139 U.S. at 338.

Customs followed that approach here. It asked whether there were any potential uses for raw sugar after the molasses was added and determined after exhaustive investigation that there were no uses without removing the molasses from the sugar. That fact, Customs reasoned, supported the conclusion that there was no reason for the syrup to contain the molasses in the first place except as a disguise. *See* App. 16a. The Panel rightly refused to question this approach, which longstanding classification law supports.

3. In addition to coloring the application of the two principles asserted by the petitioner, the "disguise or artifice" doctrine provides an alternative basis for upholding the judgment of the Court of Appeals, and thus the validity of the revocation ruling. It is therefore a significant vehicle problem that counsels against review of this case. Customs, as noted *supra*, p. 6, expressly based its revocation ruling on the principle that petitioner's anomalous pre-importation addition and post-importation extraction of molasses was nothing more than an artifice designed solely to circumvent the TRQ. *See also* App. 7a, 16a. This conclusion was reaffirmed in the

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[6] This Court's tariff classification precedents are also entirely consistent with Customs' partial reliance, in determining that the molasses is a "foreign substance," on the fact that petitioner extracted the molasses from the syrup after importation. Indeed, nothing in this Court's cases suggests that Customs may not compare the current composition of a product to its post- (or pre-) importation composition to determine whether it contains any "foreign substances" for purposes of HTSUS subheading 1702.90.10/20.

court of appeals by Judge Friedman in his concurring opinion, which agreed that "the only purpose" of petitioner's "strange arrangement was to create a fictitious product that, because of the temporary presence of the molasses, qualified for the lower rate of duty on sugar imports containing specified amounts of non-sugar solids." Pet. App. 19a. Judge Friedman further concluded that "[t]he record supports Customs' . . . factual statements, and they fully justify its legal conclusion that [petitioner's] importation of the sugar syrup with molasses is merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate. Customs, therefore, was fully justified in revoking the New York Ruling Letter that applied the lower tariff rate based upon such 'disguise or artifice.'" *Id.* at 21a (internal quotations omitted).[7]

Judge Friedman's persuasive application of the facts of this case to the "artifice or disguise" doctrine thus provides not only an alternate and independent basis for upholding the judgment of Customs and of the court of appeals, but also represents a significant vehicle problem that further counsels against review.

II. THE DECISION BELOW IS CORRECT.

Petitioner's true complaint is thus with the court of appeals'—and, at bottom, with Customs'—weighing of the voluminous record evidence in this case. Fact-intensive error-correction of this nature is not, of course, an appropriate basis for *certiorari*. S. Ct. R. 10. In any event, the court of appeals was correct to defer in this case to Customs' final revocation ruling, in light of the overwhelming record evidence

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[7] Petitioner quibbles in a lengthy footnote with a few vague "factual and legal errors" in the concurring opinion of Judge Friedman. *Id.* at 24-25 n.8. Such attempts only underscore the fact-intensive nature of this case that makes it a particularly poor candidate for review on writ of *certiorari*.

from industry specialists and from Customs' and petitioner's *own* experts that petitioner's syrup had no commercial identity.

Customs' conclusion that molasses is a foreign substance within the meaning of Subheading 1702.90.10/20 was a logical, well-reasoned, and straightforward application of the plain terms of that provision. As the court of appeals noted, "the relevant provision of the HTSUS does not indicate to what a substance must be 'foreign' in order to be a 'foreign substance' excluded from the solids content calculation of [subheading] 1702.90.10/20 HTSUS. Customs therefore had to interpret the term 'foreign substances' in order to classify [petitioner's] sugar syrup." Pet. App. 16a. The definition of "foreign" is anything "introduced from outside" or "not belonging to the place in which it is found." 6 *Oxford Dictionary of the English Language* 51 (2d ed. 1989, 1998 reprint). In interpreting the foreign substance provision, Customs sensibly applied this common understanding and concluded that the molasses, which had previously been removed from the sugar in a costly process only to be reinserted for the sole purpose of avoiding the TRQ and then removed again before the sugar could be put to commercial use, did "not belong[] to the place in which it [was] found" at the time of importation.

Customs' determination in the revocation ruling was the product of a long, exhaustive, and fair administrative process. Unlike the advance ruling, the revocation ruling followed an extensive investigation that included, as the court of appeals observed, a lengthy notice and comment period. Pet. App. 6a-7a. Customs received hundreds of pages of evidence from numerous interested parties and scientific and technical sources over the course of that investigation. Most tellingly, the record revealed petitioner's own repeated refusal, in response to repeated requests and opportunities provided by Customs, to explain any purpose for adding the molasses to the sugar other than tariff evasion, or a commercial use for

the import without re-extracting the molasses. *See, e.g.*, C.A. App. 152, 156-93, 195-97, 241-43, 245, 253-58, 295-96. Petitioner consistently failed to provide Customs with any evidence that the addition of the molasses had any commercial purpose other than camouflage. Petitioner's silence on the critical question whether its import had any use without the removal of the molasses was powerful confirmation that the molasses' sole purpose was as an artificial mask.

In the face of its inability to articulate any legitimate commercial purpose for the temporary addition of the molasses, petitioner ultimately resorts to attacking the ruling as the result of untoward political pressure. Pet. 5-6. Little need be said in response to this claim other than that it has never been accepted by any court to which it has been presented. As the record makes clear, it is hard to see how Customs' investigation could have been more thorough or exhaustive, or how its decision-making process could have been more reasoned or well-considered. At every stage of the revocation process, Customs addressed with detailed and persuasive analyses the various objections, both factual and legal, that could be raised to classification under subheading 1702.90.10/20. *See, e.g.*, C.A. App. 232, 241, 245, 869-71, 887, 889-92. That respondent and other interested parties may have communicated their views to Customs does not render the proceedings unfair or less well-reasoned. Moreover, that some of those parties may have been interested Senators or other elected representatives does not alter this analysis. It is quite clear that all parties with an interest may communicate their views to Customs at any time without rendering a proceeding the product of an illicit "political" consideration. *See Ammex, Inc. v. United States*, 62 F. Supp. 2d 1148, 1167-68 & n.16 (Ct. Int'l Trade 1999); *Way Distribs., Inc. v. United States*, 653 F.2d 467, 471 (C.C.P.A. 1981). Indeed, petitioner itself repeatedly attempted to influence Customs' decision through its own elected representatives. *See* C.A. App. 238-39; 277-85; 300-07; 347-50; 455-56. Petitioner makes no allegations of bribery, fraud, or any other sort of illicit breakdown in the

proceedings that might legitimately call Customs' decision into question.

III. THE COURT OF APPEALS' DECISION WILL HAVE NO UNTOWARD CONSEQUENCES.

Contrary to petitioner's hyperbolic claim (Pet. 25) that the court of appeals' decision will "cripple the trade community's ability to plan international commercial transactions," the decision below creates no conflict with prevailing precedent and will have few repercussions beyond its immediate impact on this case.

Other than repeating its claim that the decision below is at odds with selected principles of tariff classification—a claim that, as described above, simply ignores both the language of the specific subheading and the cardinal rule that an importer may not use "disguise or artifice" to obtain a favorable tariff classification—petitioner's principal complaint seems to be that Customs did not adhere to the advance classification ruling issued by its New York office. *See* Pet. 26 n.9. But as the court of appeals correctly observed, *see* Pet. App. 16a, Customs Headquarters possesses clear statutory authority under 19 U.S.C. § 1625(c) to engage in independent review of any tariff classification and to revoke or modify any advance classification ruling on the simple grounds that it is in error or, if not in error, no longer is in accordance with the views of the Customs Service.[8] Indeed, federal regulations make clear that although local Customs offices have

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[8] Moreover, the fact that Customs revoked its advance classification ruling does not by itself preclude judicial deference to the revocation ruling. As this Court has explained, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary [and] capricious . . . . But if these pitfalls are avoided, change is not invalidating . . . ." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal quotations and citation omitted).

authority to issue advance rulings with respect to the prospective treatment of imported articles, such rulings are always subject to further review, revocation, or modification by Customs Headquarters. *See* 19 C.F.R. Part 177.[9]

Had petitioner desired greater certainty and reliability regarding the classification of its syrup, it could have requested a Customs Headquarters Rulings directly and with full disclosure. *See* 19 C.F.R. § 177.2(a), (b)(2)(ii)(B)-(C). But it chose not to do so. Instead, petitioner provided the local office with incomplete information, neglecting to include in its request facts and evidence that Customs Headquarters later described as "essential" to a proper classification of petitioner's import. App. 14a. As the local Customs officer who worked on the original advance classification letter later made clear, had petitioner provided complete information at the outset he would have referred petitioner's classification request to Customs Headquarters to determine whether the import was a sham. *See* C.A. App. 235, 298-99. Petitioner should not now be heard to complain about the revocation ruling in this case simply because it reversed a summary advance classification ruling that had been issued

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[9] Section 177.9(a) of 19 C.F.R. limits the legal effect of an advance ruling letter "to the particular transaction or issue described therein" and provides that it is binding only "until modified or revoked." Section 177.9(b)(1) explains that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect." Section 177.9(d)(1) makes clear that "[a]ny ruling letter found to be in error or not in accordance with the current views of the Customs Service may be modified or revoked." Finally, Section 177.8(b) provides that Customs' "Headquarters Office may from time to time issue . . . rulings with respect to issues or transactions described . . . by requests" for advance rulings, and that such Headquarters' "rulings . . . are statements of the official position of the Customs Service."

on the basis of incomplete information, and that was always subject under the law to revocation or modification.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Counsel for Respondent United States Beet Sugar Association

JULY 1, 2002

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[10] As Judge Friedman stated in his concurrence below, while petitioner may have built its business in reliance on the advance ruling, it "did not disclose to Customs the true and precise nature of the practice it proposed to follow with regard to the import[] . . . . If [petitioner] had fully informed Customs of how it intended to deal with the import[] . . . , we now know that Customs would not have ruled the import was subject to the lower duty." Pet. App. 21a.

APPENDIX

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN SUGAR SYRUPS

August 25, 1999

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and the treatment relating to the classification of certain sugar syrups.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) 810328, dated May 15, 1995, concerning a mixture of cane or beet sugar and molasses with the addition of water to make a syrup, and to revoke any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published in Vol. 33, No. 22/23, of the CUSTOMS BULLETIN, dated June 9, 1999.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927-1109.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 8, 1999.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In NYRL 810328, Customs ruled that a product merely described as a sugar syrup containing sugar solids, water, and more than 60 of soluble non-sugar solids, was classified in subheading 1702.90.4000, HTSUS. Customs received what is referred to as a joint petition under 19 U.S.C. 1516 (with an option to proceed under 19 U.S.C. 1625), dated January 14, 1998, from the United States Cane Sugar Refiners' Association and the United States Beet Sugar Association, contesting the classification of a sugar syrup in subheading 1702.90.4000, HTSUS, a provision not subject to a tariff rate quota, and requesting classification under other provisions in heading 1702, HTSUS, which are subject to tariff rate quotas.

It is the position of the Associations that the soluble non-sugar solids referred to in NYRL 810328, consist of a mixture of cane or beet sugar and molasses with added water in Canada and then the molasses is extracted after importation. Thereafter, the sugars are used in the production of food products. Further, it is the position of the Associations that they know of no commercial use for the syrups as imported. It is their position that the addition and then the extraction of the molasses was to avoid the tariff rate quotas.

Customs invited the representatives of the recipient of NYRL 810328 to submit comments and legal briefs concerning the various issues. After a thorough review, pursuant to 19 U.S.C. 1625(c)(2), Customs published in the CUSTOMS BULLETIN, Vol. 33, No. 22/23, dated June 9, 1999, a notice that it intended to revoke NYRL 810328. The notice included a copy of the proposed revocation letter (961273), and noted that written comments from the public must be received before July 9, 1999. Upon the request of the Government of Canada and others, the comment period was extended until the close of business on August 9, 1999 (see page 14, CUSTOMS BULLETIN, Vol. 33, No. 29/30, dated July 28, 1999.) Approximately 30 comments were received in addition to a letter signed by 26 U.S. Senators and comments from two U.S. Congressmen. Generally, the commenters either supported or opposed the revocation of the ruling based on economic considerations. Extensive legal arguments also were submitted. Two basic legal issues were called into question; the use of the procedures under 19 U.S.C. 1625 and tariff engineering. Customs responses to these issues follow.

PROCEDURES UNDER 19 U.S.C. 1516 VERSUS 19 U.S.C. 1625

Counsel for the recipient of NYRL 810328, supported by trade associations representing the interests of importers and exporters, and others, challenged Customs legal authority to proceed in this matter under 19 U.S.C. 1625 and requested

that Customs withdraw the notice and require the petitioners to proceed under 19 U.S.C. 1516 with another publication by Customs in the Federal Register (FR) and a comment period. The result of this position, if accepted, would prevent Customs from acting on its own initiative to revoke or modify a ruling brought to its attention which Customs believes is not in conformity with the law. Prior to and after the amendments on December 8, 1993, 19 U.S.C. 1625 contains no such limiting procedures. Rather, 19 U.S.C. 1625, as amended, sets forth mandatory procedures for Customs to follow when revoking or modifying rulings.

The Customs Service is mandated to correctly administer the tariff laws of the United States. Customs has the right, indeed the obligation, to take corrective action when information comes to its attention, from whatever source, that merchandise is being improperly classified. In this case, Customs considered the information provided by the domestic industry and concluded that the classification ruling it had issued to the importer was incorrect. Consequently, Customs proposed to revoke the ruling under the procedures set forth in 19 U.S.C. 1625. The Courts have concluded that the existence of the domestic interested party petition under 19 U.S.C. 1516 does not preclude Customs from revoking a ruling. The Customs Court specifically dealt with a similar argument in the case of Way Distributors, Inc., v. U.S., 85 Cust. Ct. 54, C.D. 4870 (1980). An association representing the interests of domestic manufacturers brought to the attention of Customs that a ruling was incorrect and Customs revoked the ruling. One of the issues before the court was whether Customs revocation was invalid because the domestic interests should have been required to proceed under 19 U.S.C. 1516. The court stated as follows:

> In making this rule [revocation of the ruling] the agency was not required to consult plaintiff nor was it required to avoid communication with those advocating an interpretation adverse to plaintiff. In-

> terested parties may communicate their views to the agency at any time and in any manner not inconsistent with statute or law. The existence, of section 1516 * * * which allows an American manufacturer to complain and seek to change the classification of imported merchandise does not mean that section [1516] is the only permissible way for American manufacturers to attempt to bring about a change in import classification. Such a restrictive view finds no support in law or legislative history.

The Way decision was affirmed by U.S. Court of Customs and Patent Appeals, 68 C.C.P.A. 57, (1981), 653 F.2d 467. The appellate court quoted the above paragraph and added that section [1516] "does not deprive the Customs Service of authority to issue an interpretative ruling following informal consultation with representatives of U.S. industry.["]

At the time of the Way decision, the statutory safeguards provided by Congress in 1993, with the amendments to 19 U.S.C. 1625, did not exist. The amendments imposed mandatory procedures for Customs to follow when revoking or modifying rulings. Those procedures include publication in the CUSTOMS BULLETIN of a proposal to revoke or modify an administrative ruling which has been in effect for at least 60 days, a comment period from the public, and a 60 day delayed effective date if it is determined that a final ruling to revoke or modify the ruling will be issued. None of these new procedures affect the Way decision.

Prior to the 1993 amendment to 19 U.S.C. 1625, an importer would be given only 30 days notice that the Secretary of the Treasury agreed with the domestic industry that its prior classification of the imported merchandise was incorrect. See 19 U.S.C. 1516(b). However, Congress provided mandatory procedures in 19 U.S.C. 1625, if a prior interpretive ruling has to be modified or revoked. In this case, the new ruling is not effective until 60 days after the date of its

publication. In the instant case, the domestic interests sought Customs review pursuant to 19 U.S.C. 1516, with an option to proceed under 19 U.S.C. 1625. As part of the statutory process contained in 19 U.S.C. 1516(a)(1), Customs determined, based on additional facts brought to its attention, that NYRL 810328 appeared to be incorrect. In this instance, the ruling recipient participated in the process, met with Treasury Department officials and made submissions to Customs prior to any publication under either 19 U.S.C. 1516 or 19 U.S.C. 1625.

Once Customs reviewed the submissions from both the domestic petitioners and the ruling recipient, Customs decided to proceed to revoke the ruling. At that point, as the Way court indicated, who provided the initial information is irrelevant. Congress provided ruling recipients, in such a case, with a set of statutory protections under 19 U.S.C. 1625, as amended in 1993. Therefore, the statement in the Way decision by the appellate court that 19 U.S.C. 1516 "does not deprive the Customs Service of authority to issue an interpretative ruling following informal consultation with representatives of U.S. industry" is still in effect, notwithstanding the procedural amendments to 19 U.S.C. 1625. Customs is proceeding under the procedures of 19 U.S.C. 1625.

TARIFF ENGINEERING

Almost all of the commenters that oppose the revocation support the position that Customs, in the absence of a "use" provision of the tariff schedule, has no discretion to consider the commercial identities and/or uses of imported merchandise and must classify imported merchandise in its condition as imported. We believe this position is misplaced.

The concept of tariff engineering is based on the long standing principles of the tariff laws that merchandise is classifiable in its condition as imported and that an importer has the right to fashion merchandise to obtain the lowest rate of

duty and the most favorable treatment. The Production or manufacture of an article may, and often does, include several manufacturing or production steps with each step potentially resulting in a new article of commerce. Under the concept of tariff engineering, an importer should be allowed to choose to import its merchandise at any step that obtains the most favorable treatment. However, we believe that there are limitations to that concept and that, in the case before us, the importer has gone beyond what is permissible under the concept of tariff engineering.

In the case before us, the importer has engaged in a process which is not a genuine step in manufacturing or production of an article. Sugar and molasses are mixed in Canada. Water is then added to the mixture to make a sugar syrup. Subheading 1702.90.10, HTSUS, provides for sugar syrups derived from cane or sugar beets, containing soluble nonsugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, subject to tariff rate quotas. The molasses with its impurities added to the sugar is sufficient to assure that the syrup exceeds the 6 percent limitation so that the syrup is classified in a provision not subject to quota. If the syrup was further used in its condition as imported, in the next step in producing an article of commerce, this may satisfy the tariff engineering concept. However, after importation, the molasses is removed and the sugar is used in the same manner as sugar subject to quota. In its condition as imported, we conclude that there is no commercial use for the syrup as imported. Courts have considered this issue in many cases and have set forth guidelines as articulated in Savannah Foods Sugar Refining Corp. v. U.S., 20 C.C.P.A. 272 (1932). The fundamental issue involved in this case is whether the facts go beyond permissible tariff engineering. The position of Customs is that the processing in this case is not legitimate tariff engineering. But rather, it is merely "disguise or artifice" intended to escape a higher rate of duty such as a quota tariff rate.

The recipient of the ruling claims that "[i]n the production of sugar products, both liquid and granular, molasses is frequently used as an ingredient to achieve desired polarities." However, the molasses is added to the sugar in this case to achieve a desired level of soluble non-sugar solids for the avoidance of quota. After importation, the molasses is removed. According to comments from a domestic sugar refiner, it makes no financial sense, absent a desire to avoid the sugar tariff, for a conventional sugar operation to either enrich a liquid (syrup or molasses) stream with sugar or to add molasses to such a stream. Sugar operations separate sugar from the liquid or molasses phase, they do not separate the sugar and then introduce molasses to the sugar, effectively nullifying the refining operation. Consequently, Customs has concluded that this operation is not legitimate tariff engineering. Rather, it is an example of an importer creating a product that "is within the letter of a statute [subheading 1702.90.40, HTSUS] and yet not within its spirit nor within the intention of its makers." US. v. Aetna Explosives Co., 9 Ct. Cust. Appls. 298, 306 (1919) aff'd 256 U.S. 402 (1921). The U.S. Supreme Court recognizes that this rule is not inconsistent with the principle that merchandise should be classified in its condition as imported. Ibid.

The legislative history of the predecessor statutes to subheading 1702.90.40, HTSUS, clearly indicate that Congress intended this nonquota provision to be used to classify merchandise that does not compete with sugar. In enacting the Sugar Act of 1937 Congress concluded that sugar syrups containing soluble non-sugar solids (excluding any foreign substance that may have been added or developed in the product) equal to more than 6% of the total soluble solids did not compete with sugar. For this reason they were excluded from the definition of liquid sugar in that Act. Consequently, they were not subject to the quota and high rate of duty applicable to sugar. Sugar Act of 1937, ch.898, § 101(f), 50 Stat. 903 (1937). Sugar Hearings on H.R. 5236, Before the Subcommittee of the House Agriculture Committee, 75th

Cong. 41-44 (1937). Later tariff provisions retained that percentage. See explanation of the conversion of Paragraph 502 of the Tariff Act of 1930; as amended to item 155.35 of the TSUS, United States Tariff Commission, Tariff Classification Study, Schedule 1 Part 10, November 15, 1960. TSUS item 155.35, for sugar syrups, became subheading 1702.90.40, HTSUS, as set forth in the notice of proposed revocation.

It is equally clear that the syrup in its condition as imported competes with sugar. In their comments on the proposed revocation, two Louisiana sugar refiners claim to have lost sales of 25,000 tons of sugar per year as the result of the importations under NYRL 810328. The Department of Agriculture acknowledged that as the result of the sugar syrup importations, it was necessary to reduce the total quantitative limitations of sugar under the low tariff rate quotas, by an amount equivalent to the forecast of syrup imports by 100,000 short tons for the fiscal year 1999.

Given the legislative intent of the Congress in creating the predecessor statutes to subheading 1702.90.40, HTSUS, to apply to products that do not compete with sugar and the evidence that the product in this case does compete with sugar (information which Customs did not consider or did not possess at the time it issued NYRL 810328), Customs is obliged to revoke its earlier ruling in order to fulfill its obligation to interpret the tariff in terms of commercial reality.

As stated in the proposed notice this revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period and none have. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(C)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical

transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NYRL 810328 and revoking any other ruling not specifically identified, to reflect the proper classification of the sugar syrup. Headquarters Ruling Letter 961273 revoking NYRL 810328 and reflecting the proper classification for the sugar syrup is set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: August 25, 1999.

JOHN DURANT,

Director,

Commercial Rulings Division.

[Attachment]

[Attachment]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, August 25, 1999.

CLA-2 RR:CR:GC 961273K

Category: Classification

Tariff No. 1702.90.1000 and 1702.90.2000

DANIEL J. GLUCK, ESQ.

SERKO & SIMON

One World Trade Center, Suite 3371

New York, NY 10048

Re: Revocation of New York Ruling Letter (NYRL) 810328; Sugar Syrups.

DEAR MR. GLUCK:

In response to letters from your client, Heartland By-Products Inc. (Heartland), dated April 18 and 19, 1995, the Customs Service issued NYRL 810328, dated May 15, 1995, which held that certain sugar syrups from Australia, were classified as other sugar syrups derived from sugar cane or sugar beets, containing soluble non-sugar solids (excluding foreign substances that may have been added or developed in the product) equal to more than 6% by weight of the total soluble solids, in subheading 1702.90.4000, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed that rifling and are of the opinion that the classification set forth is not correct. A notice of proposed revocation of NYRL 810328 was published in the CUSTOMS BULLETIN, Vol. 33, No 22/23, dated June 9, 1999. After further review of the comments received in response to this notice, this letter is to advise you that NYRL 810328 no longer reflects the views of the Customs Service and is revoked.

Facts:

NYRL 810328 is void of any background information other than merely describing the merchandise that Heartland planned to import as a sugar syrup produced from sugar cane or sugar beet and will contain sugar solids, water and more than 6 percent soluble non-sugar solids and the conclusion that the syrups were classified in subheading 1702.90.4000. HTSUS.

Subheading 1702.90.1000, HTSUS (1995), provides for other sugar syrups not containing added flavoring or coloring matter, derived from sugar cane or sugar beets, and containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, subject to the quantitative quota limitations of U.S. Additional Note 5 to Chapter 17, with a general rate of duty at 3.6606 cents per kg of the total sugars, and a special rate of duty at 0.4381 cents per kg of the total sugars, if the sugar syrups qualify as North American Free Trade Agreement (NAFTA) originating goods from Canada. If the quantitative limitations have been reached, the syrups are classified in subheading 1702.90.2000, HTSUS (1995), an over the tariff rate quota provision, with duty at the general rate of 41 cents per kg and no special rate for goods originating from Canada.

Subheading 1702.90.4000, HTSUS (1995), provides for other sugar syrups not containing soluble non-sugar solids equal to 6 % or less by weight of the total soluble solids, not subject to a quantitative quota limitation, and such syrups were dutiable at the 1995 general rate of 0.7 cents per liter and a special rate of 0.2 cents per liter if the sugar syrups qualify as NAFTA originating goods from Canada.

The rates of duty and quantitative quota limitations of the 1995 tariff may have changed, but these provisions of the tariff are identical in the 1999 edition of the HTSUS.

We informed you in our letter dated April 1, 1998, that under 19 U.S.C. 1516 (with an option to proceed under 19 U.S.C. 1625), we had received a joint petition dated January 14, 1998, from the United States Cane Sugar Refiners' Association and the United States Beet Sugar Association, contesting the classification of the sugar syrups in subheading 1702.90.4000, HTSUS, a provision not subject to a tariff rate quota, and requesting classification under other provisions in heading 1702, HTSUS, which are subject to tariff rate quotas. It is the position of the Associations that non-soluble sugar solids consisting of molasses are added to the sugar syrups in Canada to avoid tariff rate quotas on sugars and sugar syrups. The Associations allege that Heartland's product competes directly with sugar and sugar syrups that are subject to tariff rate quotas. The Associations also allege that Heartland extracts the molasses, the non-sugar solids, from the imported syrups and sells the sugar from that process in the United States. The residual non-sugar solids, the molasses, are returned to Canada. According to the Associations, there is no commerce in the merchandise in its condition as imported. In effect, the Associations are saying that the addition and extraction of the molasses is an artificial process. The importer is using the process only to avoid the tariff rate quotas.

As stated, NYRL 810328 merely described a sugar syrup as containing sugar solids, water, and more than 6% of soluble non-sugar solids, and held that the syrup was classified in subheading 1702.90.4000, HTSUS. Since the ruling was issued, we have learned that molasses is added in Canada, that the molasses is extracted after importation, and that the syrup is subsequently used to produce other food products. In the original requests for a ruling dated April 18 and 19, 1995, Heartland described the mixing of sugar and molasses with the addition of water in Canada but did not reveal its plans to extract the molasses after importation in producing a sugar syrup for use in making food products. It is your position that subheading 1702.90.4000, HTSUS, is not a "use" provision and therefore, your client had no responsibility to de-

scribe the use of the syrup upon importation and that Customs did not ask for such information. Without addressing your position, it is clear that Customs did not have the benefit of this essential information in issuing NYRL 810328, until the petitions were submitted by the Associations.

We have carefully reviewed your submission dated May 18, 1998, in response to our letter dated April 1, 1998, in which we afforded you the opportunity to respond to the substance of the claims of the Associations. We advised you that we were concerned with the commercial identity and/or use of the product in its condition as imported. Specifically, we asked if there are any known commercial uses of the product without the extraction of the molasses? The question also involved whether your client uses it directly as imported in the manufacture of other food products, or sells it to others as imported for use in producing food products, without the extraction of the molasses? Thereafter, we received further submissions dated June 25, August 26, September 24, and October 7, 1998. For all practical purposes, your responses confirm that the imported syrups consist of sugar that was mixed with molasses with the addition of water in Canada, and after importation, the molasses was extracted. You further confirm that some of the recovered molasses is returned to Canada, some of it is sold for use in animal feed, and, notwithstanding the recovery, some molasses remains in the product or is lost in the process. It is now known, that after applying various proprietary technologies, the syrups are transformed into food grade sugar syrups that would have been subject to the tariff rate quota provisions, if imported in that condition. In your submission of June 25, 1998, you confirmed that the most common use of the product is as a source of sugar. Although you indicated that the imported product (with the molasses) would be used as an ingredient in the production of a food product, you have not demonstrated that it has been used for such purpose. You do not indicate whether the molasses plays a part in manufacturing of a food grade syrup. You do not state any commercial pur-

pose for the addition and subsequent extraction the molasses. In addition, you claim that there were some sales of the product in its condition as imported for use in the production of animal feed. However, no documentary evidence in support of this claim was provided. Laboratory technicians familiar with the industry are of the opinion that the syrups as imported do not contain the raw materials used in the production of animal feed. You submitted documents indicating that there is an interest on the part of potential buyers to purchase the syrup as imported. However, you have provided no evidence that sales have taken place and we must assume that such buyers would also have to remove the molasses and the impurities before the sugar syrup could be used in the production of food products. We conclude, based on the limited unsupported information concerning such sales and uses when compared to the quantities of the syrups imported by your client, that such sales and uses may be considered as de minimis or as igitive uses.

Issue:

The first issue is whether there are commercial identities and/or uses for the product in its condition as imported without the subsequent extraction of the added molasses.

If there are none, then the second issue is how that affects the classification and quota status of the imported product.

Law and Analysis:

Imported merchandise is classifiable under the HTSUS, in accordance with the General Rules of Interpretation. The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the term of the headings of the tariff schedule and any relative Section or Chapter Notes, including Additional U.S. Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be ap-

plied in order. Prior to determining whether the product was correctly classified in NYRL 810328, and not subject to quota, we need to make some preliminary conclusions.

We conclude, based on the available information as discussed above, that there are no commercial identities or commercial uses for the syrups as imported. Furthermore, we conclude that the addition of the molasses prior to importation and the extraction of the molasses after importation is an artifice and that the resulting syrups are used in the same manner as other syrups classified in provisions of the tariff that are subject to tariff rate quota provisions.

We believe that commercial identities or commercial uses may be considered in determining the classification of the sugar syrups and whether the syrups are subject to tariff rate quota provisions. The reasoning for our legal conclusion follows.

The crux of your argument is that Customs has no discretion to classify the merchandise in any manner other than in its condition as imported Worthington v. Robbins, 139 U.S. 337 (1891); United States v. Citroen, 223 U.S. 407 (1912); Mita Copystar America v. United States, 21 F.3d 1079 (Fed.Cir. 1994), and that the importers have the right to fashion merchandise to obtain the lowest rate of duty. Seeberger v. Farwell, 139 U.S. 608 (1891); Magone v. Luckemeyer, 139 U.S. 612 (1891); Merritt v. Welsh, 104 U.S. 694 (1881). Since the imported merchandise is composed of more than 6% of soluble non-sugar solids, it must, according to your position, be classified under subheading 1702.90.4000, HTSUS, free of any tariff-rate quotas for sugar.

However, the Courts have always recognized that [c]lassification is an exercise in assessing the commercial status of particular goods, ***** Alcan Aluminum Corp. v. U.S., 165 F.3d 898 (Fed.Cir. 1999). In all the cases you cited, the imported merchandise had are recognized commer-

cial identity in its condition as imported, for example "white hard enamel" sold for numerous manufacturing purposes in Worthington, pearls in Citroen, wool fabric with a small percentage of cotton traded as wool fabric in Seeberger and Magone, and sugar in Merritt. Heartland's product is not traded or sold in its condition as imported. Furthermore, Customs has concluded that the processing in this case is a mere artifice. The well recognized principle that "a thing may be within the letter of a statute and yet not within its spirit nor within the intention of its makers" applies in Customs classification cases as it does in other cases. United States v. Aetna Explosives Co., 9 Ct. Cust. Appls. 298, 306 (1919) aff'd 256 U.S. 402 (1921).

In Aetna Explosives, sulfuric acid was added to nitric acid transported from Canada to the United States by rail. At least 20% of the mixture was sulfuric acid which prevented the nitric acid from corroding the tank cars during its transportation. The sulfuric acid was removed after importation. Customs classified the merchandise as a chemical "mixture" or "preparation" under paragraph 5 of the Tariff Act of 1913, subject to a 15 percent rate of duty. Notwithstanding the product fell within the literal terms of the tariff asserted by Customs, the Appeals Court framed the issue as "whether this mixture* * * was an act of preparation or an act of admixture with a purpose of producing a new article." 9 Ct. Cust. Appls. at 302 (Underscoring added). This issue was so framed with full recognition that "the rule which usually obtains [is] that the condition of an article when imported determines its dutiable status." Id. However, the court found no infringement of that rule in deciding that the subject merchandise was not a mixture or preparation for purposes of the tariff law because it "had not reached the state of a commercial mixture contemplated by the statute. It was susceptible of no use other than as nitric acid, which must before use be again treated." 9 Ct. Cust, Appls. at 302-303. The Supreme Court affirmed.

Later cases have held that "a certain amount of ingredient, although substantial; may be ignored for classification purpose, depending upon many different circumstances, including the purpose which Congress sought to bring about by the language used and whether or not the amount used has really changed or affected the nature of the article and, of course, its salability." Varsity Watch Co. v. United States, 34 C.C.P.A. 155, 163 (1947) (Underscoring added.) Heartland did not disclose to Customs in its ruling request that the substance it proposed to import has no commercial identity nor any legitimate commercial purpose. It was only after the Associations complained that the merchandise imported by Heartland should be subject to tariff rate quota that Customs became aware that the imported merchandise had no commercial identity.

You cited many court cases which uphold the right of an importer to fashion its merchandise to obtain a favorable rate of duty upon importation and we agree with this well founded principle of the tariff laws. There are many provisions in the tariff in which classification changes occur when raw materials are further processed. In such situations, there are continuing processing steps to reach the end product. Situations in which there are no commercial purposes for a process, such as the addition and then the removal of molasses from sugar to avoid classification in a tariff provision subject to quota, cross the line of permissible fashioning to one of artifice to obtain favorable tariff treatment by the avoidance of a tariff rate quota.

Product formulation to avoid the sugar tariff was an issue in Savannah Sugar Refining Corp. v. United States, 20 C.C.P.A. 272 (1932), in which the appeals Court affirmed the decision of the Customs Court, Treasury Decision 45477. The importer advised Customs beforehand what was intended. Water and a small portion of formaldehyde were added to raw sugar to change the testing by the polariscope for the sole purpose of obtaining a lower rate of duty. After

importation, the mixture was further mixed with other raw sugars and refined. The water and formaldehyde had no value and both passed off in evaporation. There was no commercial use or commercial identity of the syrup other than the avoidance of the higher rate of duty. The Appeals Court, at page 278, stated that "no evidence was adduced showing that the product, as imported, has ever been bought and sold in the wholesale trade and commerce of the United States as sugar sirup. Indeed, except for the transaction involved, it was not shown that any such product ever existed either in the United States or elsewhere in the world, under any name, title, or designation whatsoever. So far as the record is concerned, the single importation at issue was sui generis." The Court concluded that there was no identity and held that the imported sugar syrups were subject to the higher rates of duties.

In response to the principle that an importer has the right to legitimately reduce its tax burden, the Customs Court stated as follows;

It has been established that an importer may cause his merchandise to be so manufactured as to secure for him the most favorable rate possible on importation, but the decision that established that principle, Merritt v. Welsh, 104 U.S. 694, 26 L. Ed. 896, clearly indicates that it might be a different matter if the article were treated in such a matter after manufacture as to make the manufactured article appear different from what it really was for the purpose of evading the revenue.***

The Customs Court asked the question, is it necessary that the revenue officer be actually deceived in order to amount to a fraud on the revenue? The Court answered the question as follows;

We think not, because Chief Justice Hughes stated in the case of United States v. Citron, 223 U.S. 407, 56 L. Ed. 486-*** the dutiable classification of articles imported must be

ascertained by an examination of the imported article itself in the condition in which it is imported. This, of course, does not mean that a prescribed rate of duty can be escaped by resort to disguise or artifice. When it is found that the article imported is in fact the article described in a particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue and can not be permitted to succeed.

The Customs Court concluded that the facts seem to make a clear case of resort to disguise or artifice, and held that the sugar syrup was subject to the higher rate of duty applicable for raw sugars. The position of the Customs Court was affirmed by the Appeals Court.

The issue was again before the Court of International Trade in Arbor Foods, Inc., v. United States, 9 CIT 119 (1985). Certain sugar syrups and blends containing over 65 percent sugar by dry weight were subject to quota provisions of the tariff. Pure sugar from Canada was admitted into a foreign trade zone and there mixed with corn syrup of U.S. origin. The mixtures, containing 65 percent or less sugar by dry weight, were entered into the customs territory not subject to quota provisions. The mixtures were then screened to separate out the sugar component and the corn syrup solids were sent back to the foreign trade zone for use in the next batch. Customs issued instructions that only sugar blends possessing a "valid commercial identity and which are actually used in the commerce in the United States" would be exempt from a constructive segregation. The instructions placed the sugars blends in the quota provisions of the tariff. No evidence was submitted by the plaintiff to show a commercial use for the mixtures or that they had commercial identities, other than for the avoidance of the quota provisions. While using a "chief use" analysis, the Court, as in the Savannah Sugar Refining, supra, decided in favor of the government and held that the mixtures were subject to the quota provisions.

Customs has continued in its administrative rulings to follow the principles of the above court cases. In Headquarters Ruling Letter 222146, dated June 6, 1990, foreign microscopes were admitted into a foreign trade zone and there packaged with domestic or imported duty paid cameras as a combination article to gain a more favorable rate of duty upon entering the articles for consumption. After entry into the customs territory, the cameras were removed and sent back to the foreign trade zone for further use. Customs found that there was no intention to enter the cameras into the commerce of the United States and that the transactions were a "sham". The microscopes were held to be dutiable at the higher rate of duties,

We are also of the opinion that it was the intent of the Presidential Proclamations which we have reviewed the quota provisions applicable for the sugar syrups classified in the Tariff Schedules of the United States (TSUS) (1987) prior to the conversion to the HTSUS effective January 1, 1989.

Item 155.20, TSUS, provided for sugars, sirups, and molasses derived from sugar cane or sugar beets, principally of crystalline structure or in dry amorphous form, subject to absolute quantitative quotas for specific countries and subject to the Section 22 fees (Agriculture Agreement Act of 5/12/33, 7 U.S.C. 624, as amended).

Item 155.30, TSUS, provided for sugars, sirups, and molasses, derived from sugar cane or sugar beets, not principally of crystalline structure and not in dry amorphous form: containing soluble non-sugar solids (excluding any foreign substance that may have been added or developed in the product) equal to 6% or less by weight of the total soluble solids, also subject to absolute quantitative quotas for specific countries and subject to the Section 22 fees.

Item 155.35, TSUS, provided for "other", that is, sugars, sirups, and molasses over the 6%, rule which were not subject to quotas or the sugar fees.

Item 155.40, TSUS, provided for sugars, sirups, molasses, and mixtures thereof; all the foregoing deprived from sugar cane or sugar beets and containing soluble non-sugar solids (excluding any foreign substance that may have been added or developed in the product equal to over 6% by weight of the total soluble solids, if imported for use other than (a) the commercial extraction of sugar, or (b) human consumption. These products were not subject to quotas.

Item 155.75, TSUS, provided for sugars, sirups, and molasses, described in this subpart, flavored: and sirups, flavored or unflavored, consisting of blends of any of the products described in the subpart. Under item 958.10, blended sirups in item 155.75, containing sugars derived from cane or beet and capable of being further processed or mixed with similar ingredients and not for the ultimate consumer, and under item 958.15, articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, were subject to a "none" absolute quota.

The HTSUS was effective on January 1, 1989. Heading 1701 covers raw and refined cane or beet sugars in solid form, containing and not containing flavoring or coloring matter. Heading 1702 covers other sugars including sugar syrups but it does not cover molasses. Heading 1703 covers molasses. Heading 1704 covers sugar confectionery.

The sugar and syrups (not molasses syrups), derived from sugar cane or sugar beets with the less than 6% rule, classified in item 155.30, became subheading 1702.90.30, subject to the absolute quotas and fees, and the "other" over the 6% percent rule classified in item 155.35, TSUS, became subheading 1702.90.40; HTSUS. Item 155.75, TSUS, in part, became subheadings 1702.30.40,1702.40.00, and

1702.60, HTSUS. However, there were two important changes in the HTSUS.

1. Molasses, as syrups, including the less than and the over the 6% rule classified in items 155.30 and 155.35, and molasses as a mixture with sugar syrups (for animal feed) classified in item 155.40, were separated out with their own heading 1703, HTSUS, not subject to quotas and fees. However, molasses resulting from the extraction or refining of sugar used for the commercial extraction of sugar or for human consumptions, classified in subheadings 1703.10.30 (cane) and 1703.90.30 (beet) were subject to high rates of duties .77 cents per liter (1989) and currently (1999), at .42 cents per liter. Molasses used for animal feeds were classified in subheadings 1703.10.50, and 1703.90.50, with low rates of duties.

2. Sugars and syrups derived from cane or beet over the 6% rule, not subject to quotas and fees in item 155.35 became classified in subheading 1702.90.40, subject to quotas and fees. This was corrected by Presidential Proclamation 6151, dated July 2, 1990 (55 FR 27171), which eliminated subheading 1702.90.40 from the quota notes of Chapter 17 and also made other corrections to insert and delete quotas.

Presidential Proclamation 6179, dated September 13,1990, eliminated the absolute quotas, and established low tariff rates for certain countries within quantitative limitations, and high tariff rate provisions for over the quantitative limitations and for other countries. Presidential Proclamation 6763, dated December 13, 1994, Paragraph 5, eliminated subheadings 9904.50.20 and 9904.50.40, the Rates of Duties for Section 22 Fees, and delegated to the US. Trade Representative and the Department of Agriculture to set quantitative limitations and the amounts for specific countries by notice in the Federal Register. However, new U.S. Additional Notes 2, 3, and 4 were inserted covering the provisions of subheadings 9904.50.20, 9904.50.40, with quantitative limitations. The tariff rate quota provisions, other than changes

in the quantitative limitations, have remained unchanged and we have low tariff duties within quantitative limitations, and high tariff rates for over the quantitative limitations. This is the scheme of the quota provisions for sugar classified in Chapter 17, HTSUS.

At this point in time, the sugar syrups subject to quotas under the HTSUS, were in sync with the quotas under the TSUS and the intent of the Presidential Proclamations. Prior to January 1, 1989, the sugar syrups in question, would have been classified in item 155.75, TSUS, subject to an absolute quota. There is no evidence that the conversion to HTSUS, intended to change the quotas and in this case, there is an artificial processing by Heartland to avoid the quota.

The Tariff Act of 1930, as amended, and the TSUS, treated molasses, a by-product from the refining of sugar cane and beets, differently from sugar and sugar syrups. The HTSUS clearly treats them differently. Raw sugar can be refined falling short of the less than 6% requirement or it can be further refined to the point until it has less than the 6% (of impurities). In both cases, the sugar is derived from cane or beet. Molasses is a by-product derived from the refining of sugar cane or beets. However, molasses is not sugar derived from the refining of sugar cane or sugar beets.

Subheading 1702.90.1000, HTSUS (1995), provides for other sugar syrups not containing added flavoring or coloring matter, derived from sugar cane or sugar beets, and containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6% or less by weight of the total soluble solids. The mixture of molasses with sugar is not a refining process for raw sugar, and the addition of water to such a mixture does not create a "sugar syrup" derived from a refining process From sugar cane or sugar beet. Since subheading 1702.90.10 and 1702.90.20 (the Current Tariff rate quotas for the 6% less rule) and subheading 1702.90.40, the over the 6% rule, only apply to sugar syrups derived from sugar cane

or Sugar beets, and does not include molasses or a mixture of sugar and molasses, the syrup consisting of a mixture of sugar and molasses, cannot be classified by virtue of GRI 1 in subheadings 1702.90.10/2 or 1702.90.40, unless the added molasses with its impurities are excluded. And then, the Sugar syrup would be classified by virtue of GRI 1 in subheadings 1702.90.10/20, subject to tariff rate quotas. We believe that molasses with its impurities is a foreign substance and excluded in determining the 6% rule of subheading 1702.90.1000, HTSUS.

Subheadings 1702.90.10, and 1702.90.20, HTSUS, provides for sugar syrups derived from sugar cane of sugar beets containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the process) equal to 6% or less by weight of the total soluble solids. The sugar used in the process in Canada presumably met this criteria. The addition of the molasses to the sugar is a foreign substance containing impurities in producing the sugar syrup and, therefore, we exclude the molasses with impurities in calculating the 6% rule. Further, as stated, the conversion of the TSUS to HTSUS, and with the corrections of Presidential Proclamation 6151, indicate no intention to permit a syrup consisting of a mixture of sugar and molasses to be exempt from the quota provisions unless it was for use as animal feed.

There is a view that since the molasses is naturally found in sugar cane or sugar beets, it meets the requirements of subheadings 1702.90.10/20, HTSUS, in that it (molasses) is derived also from sugar cane or sugar beets. As stated above, molasses is derived as a by-product from the refining of sugar cane or sugar beets and it is not derived as sugar from the refining of sugar cane or sugar beets. Thus, molasses syrups are classified in heading 1703, HTSUS, and not in heading 1702, HTSUS.

The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the

official interpretation of Harmonized Tariff System at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the Headings and General Rules of Interpretation of the HTSUS. A view has been expressed that since the EN's state that heading 1701 "covers brown sugar consisting of white sugar mixed with small quantities of, e.g., caramel or molasses,* * *" it is permissible to add water to such sugar and molasses and have a sugar syrup in heading 1702. The EN's go on to state that "it should be noted that cane and beet sugar fail in this subheading only when in the solid form (including powders); such sugar may contain added flavoring or colouring matter." Subheadings 1701.11 and 1701.12 covers cane and beet syrups containing added flavoring or coloring matter. In addition, the EN's for sugar syrup, 1701.91 and 1701.99, covers cane and beet sugars that do contain added flavoring or coloring matter. However, for sugar syrups, heading 1702 provides for sugar syrups not containing added flavoring or coloring matter, therefore, the heading specifically excludes, sugar ups under heading 1702, specifically state "they do not contain added flavoring or colouring matter" and there is no indication that molasses is permissible.

We conclude that the sugar syrup in question would have been subject to quota under the TSUS, and as intended, the sugar quota provisions of the TSUS were carried over in the conversion to the HTSUS. The HTSUS at the four and six digit level represents the tariff at the international level. A further breakout is permitted at the national level beyond the six digit breakout, provided that the subheadings are covered by the heading at the international level of the Harmonized System to meet the needs of the individual members of the international system. Subheadings 1702.90.05 through 1702.90.40, HTSUS, at the eight digit level, fit the specific needs of the commerce of the United States and the quota provisions of the TSUS were carried over in the conversion to the HTSUS.

Accordingly, the TSUS quota provisions for sugar syrups may be considered to determine what was intended to be included or excluded from the sugar quota provisions of the HTSUS. We must conclude that sugar mixed with molasses with the addition Of water to make a syrup was not intended to be excluded from the quota provisions under the TSUS and the Presidential Proclamations, and such merchandise was excluded from the quota provisions if the merchandise was imported for animal feed. See item 155.40, TSUS, cited above. Otherwise, it was classified in item 155.75, TSUS, subject to absolute quota.

Holding:

For all of the reasons stated above, the sugar syrups as described in their condition as imported, are classified as sugar syrups derived from sugar cane or sugar beets, and containing soluble nonsugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, in subheading 1702.90.1000, HTSUS, subject to the quantitative quota limitations of U.S. Additional Note 5 to Chapter 17. If the quantitative limitations have been reached, the syrups are classified in subheading 1702.90.2000, HTSUS, an over the tariff rate quota provision.

NYRL 810328 is revoked. In accordance with 19 U.S.C. 1625(c)L this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN DURANT,

Director, Commercial Rulings Division.

No. 01-1469 (4)

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

- AND -

UNITED STATES BEET SUGAR ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

"Discretion in the custom-house officer should be limited as strictly as possible," this Court has observed, because inconsistency in the interpretation and application of the customs laws is "the bane of commerce." *Merritt v. Welsh,* 104 U.S. (14 Otto) 694, 702 (1881). For more than a century, two basic principles of tariff classification law have cabined the discretion of the Customs Service in order to ensure "uniformity in the imposition of [customs] duties." *Worthington v. Robbins,* 139 U.S. 337, 341 (1891). The first is that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Id.*; *accord United States v. Citroen*, 223 U.S. 407, 414-415 (1912). The second is that importers are entitled to fashion their goods so as to secure the most favorable duty rate. *See, e.g., Citroen*, 223 U.S. at 424; *Seeberger v. Farwell*, 139 U.S. 608, 611 (1891); *Merritt,* 104 U.S. at 702.

The Federal Circuit abandoned both of these tenets of classification law when it upheld a Customs ruling reclassifying Heartland's sugar syrup. Although Heartland's product, in its condition as imported, falls squarely within the ambit of HTSUS 1702.90.40, Customs and the Federal Circuit classified it elsewhere by treating its molasses ingredient as a "foreign substance[ ]." In derogation of the statute and this Court's precedents, Customs and the appellate court rested their classification on the pre-importation processing of Heartland's product and the product's post-importation use, and disregarded Heartland's right to fashion the product so as to enjoy favorable tariffs.

Respondents seek to evade the inescapable contradiction between the decision below and this Court's precedents. First, they offer a feeble defense of the actual grounds of the decision by the Federal Circuit. Then, they rely heavily on the argument, not accepted by the Federal Circuit, that Customs properly considered the pre-importation processing and post-importation use of Heartland's syrup to determine whether Heartland engaged in an "artifice or disguise." Next, Respondents portray this case

as one presenting only the question, addressed by this Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), of the degree of deference to be accorded to a Customs classification ruling. Finally, Respondents assert that this case has no repercussions beyond Heartland itself. These contentions are without merit, and the grounds for granting the petition are compelling.

1. Respondents tread lightly on the Federal Circuit's decision, as if fearful to fall through the gossamer foundation. The Government describes the decision as a "routine and fact-bound" application of a "narrow tariff provision," Brief in Opposition of the United States ("USOpp.") 10, 9. Yet there is nothing "routine" about a decision that contradicts more than a century of this Court's precedents, and there is scarcely any attention paid to the "narrow tariff provision" in the decision.

Both Respondents quote the Federal Circuit's rationale for disregarding as "foreign" the molasses ingredient in Heartland's sugar syrup: "When the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance." Pet. App. 17a (quoted at USOpp. 16; Brief in Opposition of the United States Beet Sugar Association ("BAOpp.") 10). The "logic" of this rationale is elusive at best: egg yolks are hardly "foreign" to an omelet, even if the yolks and egg whites are separated at an earlier stage of preparation and then mixed to make the omelet. Moreover, the court's rationale collides with the fundamental principle that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Citroen*, 223 U.S. at 414-415.

Time and again this Court has rejected the argument that classification of an imported article could turn on the condition of the article before or after importation, or on the tariff-reduction objectives achieved by importation of the article in a particular condition. By contrast, the Federal Circuit's rationale in effect concedes that only by examining the imported article

in a pre-imported condition — indeed, only by examining one ingredient (granular sugar) of the imported article (sugar syrup) and the way in which that ingredient is originally made ("purification" that results in a molasses "by-product") — can the reclassification of Heartland's syrup be sustained. *Citroen*, which held that unstrung pearls must be classified as such, even if they were strung and then unstrung before importation, only to be restrung afterwards, bars the Federal Circuit's consideration of pre-importation processing. Furthermore, the implicit basis for the Federal Circuit's rationale — that assembly, disassembly, and reassembly of a manufactured product is somehow inappropriate — was expressly rejected by *Citroen*, and the addition of this specific "by-product" (molasses) to this specific "purified or partially-purified raw product" (granular sugar) was expressly approved in *Merritt*.[1]

The Government defends the court of appeals ruling on the grounds that the exclusion from HTSUS 1702.90.40 of "foreign substances that may have been added or developed in the product" actually "requires" the consideration of pre-importation processing. USOpp. 12. The Federal Circuit itself, however, never embraced this view, and with good reason. The issue before Customs and the courts was never whether molasses was "added" to granular sugar but whether the molasses so added

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[1] The Federal Circuit's rationale is incompatible not only with this Court's jurisprudence but also with the record. The rationale overlooks the record of expert affidavits, C.A. A0839-A0845, reference works, C.A. A0548-A0550, product specifications, C.A. A0783-A0792, and Heartland-specific evidence, C.A. A0254-A0259, all to the effect that mixing molasses with purified or partially-purified sugar is commonplace in the production of sugar products, including sugar syrups. Pet. App. 47a-49a. Moreover, it is difficult to credit the Federal Circuit's characterization of this rationale as not "unreasonable," given that the treatment of molasses as a "foreign" substance, in the specific context of HTSUS 1702.90.40, was rejected on the record by the National Import Specialist responsible for the classification of sugar products by Customs itself. *See* C.A. A0373; *see also* C.A. A0139-A0142, A0298-A0299.

was "foreign" to the sugar syrup. As the CIT concluded, this issue must be determined by consideration of the structure and terms of the tariff schedule, which focus on the ingredients of the sugar syrup and not on the process by which it is made. Pet. App. 39a-42a. The consideration of pre-importation processing by Customs, upheld by the Federal Circuit, rests on the interpolation into the tariff schedule of a reference to sugar "refining." Pet. App. 41a. This interpretation-by-interpolation is not "require[d]" by the tariff schedule; it is foreclosed by it.[2]

2. Respondents apparently realize the weakness of the Federal Circuit's decision if judged by the structure and terms of the specific tariff provision or if judged by the longstanding judicial precedents on tariff classifications. Accordingly, Respondents elide the statutory analysis, in which the CIT engaged thoroughly, Pet. App. 35a-42a. As for the case law, Respondents argue at length that Customs may depart from the two tenets of tariff classification if it suspects that an importer has "evade[d] an otherwise-applicable tariff by resorting to artifice or disguise." BAOpp. 11-12; *see id.* at 13-16; USOpp. 10-11, 14-15. That argument rests on a misstatement of this Court's precedents, a revisionist account of the undisputed evidence, and a conflation of the majority and concurring opinions below. Respondents' efforts to square the Federal Circuit decision with *Merritt*, *Worthington*, *Seeberger*, and *Citroen* are unavailing.

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[2] At bottom, both Customs and the Federal Circuit construed HTSUS 1702.90.40 as they wished it to be, not as it actually is. Remaking tariff classifications is a legislative task, however, not an administrative or judicial one. Congress could have made sugar syrups exempt from the TRQ only if they were made by a refining process, but Congress did not do so. *Compare* Pet. App. 73a *with* Pet. App. 72a (HTSUS 1703 refers expressly to product "resulting from the extraction or refining of sugar," but HTSUS 1702 does not). If HTSUS 1702.90.40 is to be reworked, the reworking must be done by the legislative branch, not "by judicial construction." *Robert G. Lynch Co. v. United States*, 49 C.C.P.A. 74, 79 (1962). *See Citroen*, 223 U.S. at 416 (where "the [tariff] statute has furnished the test [of classification,] we are not at liberty to make another").

a. The "artifice or disguise" argument advanced by Respondents is a tapestry woven without a thread of Supreme Court precedent and without a thread of record evidence. The case law confirms that a finding of artifice or disguise is an extraordinary one — so extraordinary that this Court has never found sufficient basis for such a finding. In dicta, however, the Court has indicated that, in the absence of an intentional deception by the importer, there can be no artifice or disguise and the merchandise at issue must be classified in its condition as imported. *See Citroen*, 223 U.S. at 415. "So long as no deception is practised, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Merritt*, 104 U.S. at 704.[3]

In case after case, this Court has held to be lawful an importer's effort to import a product in a state that is beneficial for tariff purposes, the very same effort that Respondents attribute to Heartland and then condemn as artifice or disguise. For example, Respondents would cry "artifice or disguise" whenever there are "no commercial purposes for a process" employed by the importer. BAOpp. 13; *accord* USOpp. 13. But if that were the law, *Merritt* and *Seeberger* would have been decided differently. There was no suggestion in *Merritt* that the importer had a "commercial purpose" for adding molasses to its sugar product, other than to reduce its tariff. Indeed, the Court expressly noted that the importer sought to "avoid the burden of high duties" — an objective that the Court found to be perfectly legitimate and in no way indicative of artifice or disguise. 104 U.S. at 704. In *Seeberger*, it was undisputed that the introduc-

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[3] *Merritt* thus forecloses the Government's sweeping definition of artifice or disguise as "a carefully and delicately prepared contrivance for doing indirectly what one could not do directly." USOpp. 10 (quoting from dictum in *Savannah Sugar Refining Corp. v. United States*, 61 Treas. Dec. 401, 407, *aff'd*, 20 C.C.P.A. 272 (1932)). The Government fails to note that this formulation did not form the basis of the trial court's decision, was not adopted by the appellate court, and has never been endorsed by any court in the 70 years since.

tion of a small quantity of cotton into a woolen fabric "would not materially change the character of the goods as merchandise," 139 U.S. at 611, and made sense only to reduce tariffs. Nevertheless, the Court held that the importer was entitled to add cotton to the woolen fabric so as to take advantage of the lower duty applicable to goods "composed in part of wool." *Id.*

The Beet Association also suggests that artifice or disguise should be suspected if an imported product has "no potential uses in its current form." BAOpp. 14-15. To the contrary, this Court has repeatedly upheld the classification of articles in their condition as imported even though post-importation processing was required to make the articles useful. In *United States v. Schoverling*, 146 U.S. 76 (1892), Customs argued that an importer was importing gunstocks and barrels separately to avoid the higher duties on completed shotguns. Yet this Court held that the gunstocks were dutiable as gunstocks even though they had no practical use until, after importation, the importer assembled them with the barrels to make complete shotguns. *Id.* at 81-82. *Accord Worthington*, 139 U.S. at 338 (white hard enamel was properly classified as raw material rather than as "watch materials," despite undisputed evidence that "before [the product] can be applied to any practical use its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied"). In sum, this Court's holdings consistently confirm that fashioning a product to achieve reduced tariffs is not an artifice or disguise, and that the product so fashioned must be classified in its condition as imported.

b. Not only do Respondents' claims of artifice or disguise contradict this Court's precedents but also they rely heavily on a remastered record that omits inconvenient facts.[4] Heartland

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[4] Respondents distort the record regarding Heartland's operations. They suggest that Heartland mixed molasses with "sugar syrup," USOpp. 9, BAOpp. 10, to increase the soluble non-sugar solids above the six percent threshold, imported the syrup, "re-remove[d] the molasses," BAOpp. 3, and then returned the same molasses to Canada for reuse in another batch. USOpp. 2-3, 6; BAOpp. 2-3. First, as a

responded truthfully to each question that Customs posed in considering Heartland's 1995 request for an advance ruling. As Heartland informed Customs, "Granular raw sugar would be combined with molasses . . . to produce a brown sugar of approximately 93 percent polarity," which would "then be dissolved in hot water" to yield a syrup of over six percent soluble non-sugar solids. C.A. A0076. The accuracy of these statements was never disputed, and Customs's own analysis of product samples confirmed their accuracy. Pet. App. 46a; Pet. 4 n.1.

Where, then, was the deception? According to Respondents, Heartland "failed to disclose the post-importation processing of the imported mixture in the United States and the intended use of the liquid sugar in the domestic market." USOpp. 3; *accord* BAOpp. 4. Respondents omit to mention that Customs *itself* considered these post-importation uses to be irrelevant in 1995 when it was considering Heartland's ruling request. *See* Pet. App. 46a; C.A. A0073. Customs was correct in considering post-importation use irrelevant: as the CIT explained, Pet. App. 46a, the regulation governing advance ruling requests requires a description of an article's chief use only if the tariff classification is a "use" provision. The subheading at issue here — HTSUS 1702.90.40 — is not one. *Id.*

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matter of record, molasses was added to granular sugar, not to sugar syrup, and molasses was not "removed" from the sugar syrup prior to importation. C.A. A0074-A0077. Second, the soluble non-sugar solids in the sugar syrup were attributable not only to the molasses but also to the granular sugar. C.A. A0793. Third, the imported product was a homogenous syrup from which molasses could not simply be extracted; a capital-intensive process was required to refine the imported sugar syrup into liquid sucrose. C.A. A0842, A0849, A0255. Finally, during the refining process in the United States, the original molasses was not "removed" from the sugar syrup. The molasses by-product contained sucrose and impurities from both the original granular sugar and the original molasses; it was not the same molasses that had been mixed with the granular sugar before importation. C.A. A0844, A0842, A0256.

Customs was *not* deceived by Heartland's 1995 ruling request. Indeed, Customs reaffirmed the 1995 ruling after a thorough investigation in the fall of 1997 that, according to the Beet Association, "uncovered the whole story." BAOpp. 4-5. After the 1997 investigation, Customs informed the Beet Association that the production, importation, and refinement of the syrup and the exportation of molasses by-product to Canada for use in making the syrup were all "perfectly legal under the [advance] ruling and the principles followed in issuing the ruling." C.A. A1659; *see also* Pet. App. 46a-47a. As Customs noted, "the principle of Customs jurisprudence here requires that goods be classified 'in their condition as imported.'" C.A. A1659; *see* C.A. A0139-A0142.

In light of that principle, Customs staff had resolved as late as August 1998 to "affirm the Heartland ruling based on the case law." C.A. A0312. Customs adhered to that view until 22 Senators jointly wrote to the Secretary of the Treasury, demanding that he "direct" Customs to revoke Heartland's advance ruling. C.A. A0351-A0353. Only when it became politically imperative to "change . . . 200 year[s] [of] precedent," C.A. A0363, did Customs resort to the artifice of "artifice or disguise." It is inconceivable that Customs would have delayed its revocation of the advance classification ruling until September 1999, after "uncover[ing] the whole story" in the fall of 1997, if Heartland's activities were truly deceptive.

c. Notably, neither of the lower courts accepted Respondents' "artifice or disguise" argument. The CIT held that the "record evidence demonstrates that [Heartland] did not engage in artifice or deceit to obtain the initial ruling under subheading 1702.90.40 HTSUS." Pet. App. 58a. The Federal Circuit majority did not disturb this CIT conclusion. Respondents make much of Judge Friedman's concurrence, USOpp. 8, 11; BAOpp. 8, 15-16, lauding it as a "persuasive application of the facts of this case to the 'artifice or disguise doctrine,'" BAOpp. 16. But the concurring opinion's factual premises are contradicted by evidence that Respondents do not dispute. Pet. 24 n.8. More-

over, the opinion's standard for artifice or disguise — whether Heartland would have added molasses to the sugar syrup *after* importation if the molasses had not been used to manufacture the sugar syrup in the first place, Pet. App. 19a — utterly contradicts the holdings of *Merritt* and its progeny. Thus, the concurrence poses no "significant vehicle problem." BAOpp. 16.

3. The Beet Association attempts to repackage this case as a "straightforward application of this Court's holding in *Mead*," BAOpp. 9, arguing that the Federal Circuit merely held that Customs's interpretation of the term "foreign substances" was entitled to deference.

But the Court need not revisit *Mead* to reach the issue presented in the petition. Although *Mead* instructs that an agency interpretation may be "eligible to claim respect according to its persuasiveness," 533 U.S. at 221, it does not cloak Customs with discretion to disregard longstanding tenets of classification law established by this Court. "[C]ourts" — not Customs officials — "are the final authorities on issues of statutory construction," *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (citation and internal quotation marks omitted), and once this Court has spoken on a subject, administrative agencies and the lower courts are not free to disregard its rulings. This Court's decisions in *Merritt*, *Worthington*, *Seeberger*, *Schoverling*, and *Citroen* firmly establish the principles that goods must be classified in their condition as imported, and that importers are entitled to fashion their products to benefit from lower duty rates. It was error for Customs to interpret the term "foreign substances" in a manner inconsistent with these principles, and it was reversible error for the Federal Circuit to affirm a Customs interpretation so at odds with this Court's precedents.

4. Respondents nonetheless argue that this case is not worthy of review because it is a "narrow precedent," BAOpp. 8, which, if left undisturbed, will not "introduce broad uncertainty," USOpp. 7, nor have "untoward consequences," BAOpp. 9. In short, Respondents contend that the issues presented by the petition are of interest only to Heartland itself.

This contention belittles the two principles of classification law and their practical importance to the trade community. To protect the settled expectations of U.S. importers and their customers, the Court has directed that "certainty and impartiality in administration . . . should preeminently characterize the operation of tariff laws." *Citroen*, 223 U.S. at 424. The decision below frees Customs to choose whether to classify goods based on their condition as imported or on their condition at an earlier stage of production or on their intended use. Products identical in their condition as imported may now be subject to any number of different classifications, ensuring widespread inconsistency, controversy, and delay. A leading trade association, in urging the Federal Circuit to affirm the CIT, cited the "grave concern" of its members about the "injection of uncertainty into the operation of our tariff laws." Brief of Amicus Curiae American Association of Exporters and Importers, Aug. 1, 2000, at 11.[5]

This is precisely the consequence that this Court foresaw and precluded in insisting that articles be classified "upon an examination of the articles themselves, [not] upon extrinsic evidence obtained long afterwards." *Citroen*, 223 U.S. at 422 (internal quotations omitted). The latter approach, this Court warned, "encourages partiality, promotes injustice, and has broken down in practical application." *Id.* at 422-423. This is the fate that Heartland and all importers now face, unless this Court acts to restore its "simple and workable" requirement that products be classified in their condition as imported. *Id.* at 424.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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[5] In its newsletter to members, AAEI noted that the "implications" of the Federal Circuit's decision extend "beyond the facts of this one industry and its disputed transactions." The decision could "lead to serious complications and uncertainties for importers and exporters, as well as their suppliers and customers." AAEI, *International Trade Alert*, Sept. 3, 2001, at 1 (12 copies lodged with Clerk of the Court).

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(5)

In the Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

- AND -

UNITED STATES BEET SUGAR ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner Heartland By-Products, Inc. hereby submits its views regarding the legislative enactment to which the Government refers in its letter to the Court dated August 9, 2002. On August 6, 2002, the Trade Act of 2002 became law. *See* Trade Act of 2002, Pub. L. 107-210, 116 Stat. 933 (2002) (the "Act"). Although one section of the Act relates to the classification of Heartland's sugar syrup, the Act has no bearing on the question presented in the petition. Because the need for further review remains acute, both for Heartland and for the trade community generally, the petition should be granted.

1. The Act was widely discussed and debated because of its controversial grant of broad trade promotion authority to the President and its renewal and expansion of various major U.S. trade programs, such as trade adjustment assistance, Andean trade preferences, and the Generalized System of Preferences. But "tucked neatly away" in the 117-page statute, 148 CONG. REC. S4326 (daily ed. May 14, 2002) (statement of Sen. Baucus), is a short provision, Section 5203, fulfilling a far narrower agenda. That provision codifies the reclassification of Heartland's sugar syrup that was announced by the Customs Service in 1999, invalidated by the Court of International Trade ("CIT"), and eventually upheld by the Court of Appeals for the Federal Circuit.

Specifically, Section 5203 amends the Harmonized Tariff Schedule of the United States ("HTSUS") by specifying that molasses is a "foreign substance[ ]" within the meaning of HTSUS 1702.90. As Congress recognized, *see* H.R. CONF. REP. NO. 107-624, 107th Cong., 2d Sess., at 264-265 (2002), and as the Federal Circuit acknowledged in the decision below, Pet. App. 16a, HTSUS 1702.90 did not previously state that molasses is encompassed by the term "foreign substances." The newly amended language expressly provides that a tariff-rate quota ("TRQ") applies to sugar syrups "[c]ontaining soluble

non-sugar solids (excluding any foreign substances, *including but not limited to molasses,* that may have been added *to* or developed in the product) equal to 6 percent or less by weight of the total soluble solids." H.R. CONF. REP. NO. 107-624, at 117 (new language in italics). The Conference Report, *id.* at 265, explains that the legislative purpose was to

> make clear in the statute an important element of the ruling of the Court of Appeals for the Federal Circuit in *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126 (Fed. Cir. 2001), i.e., that molasses is one of the foreign substances that must be excluded when calculating the percentage of soluble non-sugar solids under [HTSUS] 1702.90.40.

By subjecting sugar syrups such as Heartland's to a TRQ, Section 5203 effectively forecloses Heartland from importing its sugar syrup in the future. The legislative action does not, and must not, however, foreclose this Court's consideration of the crucial legal issues raised by the petition.

2. The question presented in the petition is whether the Federal Circuit, contrary to longstanding principles of classification law established by this Court, correctly upheld a Customs ruling that rested not on the condition of an article upon importation but on the article's post-importation use and that rejected the importer's entitlement to fashion the article so as to enjoy favorable tariff treatment. Section 5203 amends HTSUS 1702.90, but it does not amend the principles at issue. Congress did not address, let alone alter, the principle that goods are classified in accordance with their condition as imported, regardless of their post-importation use. Nor did Congress nullify the principle that an importer is entitled to fashion its product so as to enjoy favorable tariff rates. After the enactment of the Act, as before its enactment, the Federal Circuit's decision stands as binding precedent for an approach to the classification of merchandise that is directly at odds with the decisions of this Court.

Accordingly, this Court's review of the Federal Circuit decision remains a matter of profound significance to the wider trade community. The two principles of classification law that the Federal Circuit failed to acknowledge are the very principles that have shaped the operations and expectations of U.S. importers, their suppliers, and their customers every day for over a century. *See* Pet. 25-29; Reply Brief for the Petitioner 9-10. If these principles may now be disregarded at will by Customs and the courts, then the trade community will have lost the "certainty and impartiality in administration which should preeminently characterize the operation of tariff laws." *United States v. Citroen*, 223 U.S. 407, 424 (1912). Regardless of the future classification of particular sugar syrups, action by this Court is essential to restore the foundation of classification law that has been undermined by the Federal Circuit.

3. Moreover, the case or controversy over the question presented remains very much alive. Based on the Federal Circuit's decision, Customs has claimed that Heartland owes tens of millions of dollars in TRQ duties on imports predating the Federal Circuit's reversal of the CIT. Although the new statute establishes the classification of future importations of sugar syrups like Heartland's, it does not resolve the classification of those sugar syrups prior to the amendment of the HTSUS.[1]

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[1] While amending HTSUS 1702.90 in Section 5203 of the Act, Congress also amended HTSUS 9902.84.02 in Section 5202 to make the importation of certain boilers duty-free. Congress expressly made the latter amendment effective retroactively to January 1, 2002. H.R. CONF. REP. NO. 107-624, at 116. No such retroactive effective date was set forth for Section 5203. *See Martin v. Hadix*, 527 U.S. 343, 361 (1999) (adhering to the normal "assumption that statutes are prospective, in the absence of an express command by Congress to apply the [statute] retroactively"); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 284 (1994) (observing that the Court had never, in any case "in which Congress had not clearly spoken, . . . read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment").

Thus, not only the viability of this Court's precedents but also the liability of Heartland for substantial duties may hinge on this Court's determination whether the Federal Circuit decision is tenable.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

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AUGUST 19, 2002

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[2] *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (although ordinance challenged by plaintiff had since expired, case was not moot because parties continued to dispute whether plaintiff was entitled to damages based on prior application of allegedly unlawful ordinance); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978) (although parties had resolved their dispute over how utility bills were to be calculated, an Article III controversy remained with respect to utility customers' claim for actual and punitive damages based on temporary termination of their utility service).